WAYNE STATE
Law School

Rebecca Robichaud
Assistant Professor (Clinical)
Director of Clinical Education

July 20, 2023

The Honorable Stephanie D. Davis
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, Ohio 45202-3988

Re: Juliet Happy Recommendation Letter

Dear Judge Davis,

I am pleased to write this letter of recommendation for Juliet Happy. I met Juliet when she was a student in my evening section of criminal law. Since that time, I have had the pleasure of working with her in our Immigration Appellate Advocacy Clinic (IAAC) and as a directed study student.

Juliet's participation in her section of criminal law made teaching a joy for me that semester. Her questions and comments in class evidenced a strong intellectual curiosity and analytical abilities that belied her time in law. While she endured some family difficulties during this time, Juliet always came to class prepared and engaged in class discussions. Juliet's approach to class also created a safe space for her peers to participate. She would often take a classmate's comment and build on it in a manner that supported the student and clarified the law, despite what may have been a misunderstanding of the material by the original student.

Professor Jon Weinberg supervised Juliet and her partner in the IAAC. However, I reviewed her work and Jon and I co-taught her in the classroom. Juliet again excelled at understanding complex legal concepts while also assisting her peers in coming to understand these concepts. She and her partner worked exceptionally well together, navigating work, school, and family schedules. Juliet and her partner produced an appellate brief that was outstanding. In fact, the non-profit partner asked if they could share it as an example to other pro bono attorneys.

In working with Juliet, it is clear she is committed to using her intellectual abilities, her legal education, and her life experience to make the law more accessible and to promote social justice. During the criminal law course, I spoke about the need for pro bono assistance in the immigration community. Juliet approached me after class hoping to volunteer. We spent much of last summer attempting to take on a pro bono case. Unfortunately for us, but not the clients, it did not come to fruition as the agency had found other pro bono attorneys.

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I was willing to take on the pro bono case as I recognized in Juliet a strong work ethic, the ability to understand the complexities of immigration law, and an advanced level of legal writing. I very much looked forward to working with her and was disappointed when it did not come to fruition. This summer due to several other commitments I was not going to take on any student directed studies. But when Juliet approached me, I agreed to supervise her as I know her work will be thorough and thoughtful, and her writing exemplary. I am excited to see what her research yields and to read her work.

I would be happy to talk to anyone about this recommendation. I can be reached via my cell phone at 313.971.6017. I appreciate your time and consideration.

Rebecca Robichaud

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July 25, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

Juliet was in my civil procedure class for a full year. Her work was excellent both semesters, both in writing and in asking and answering questions in class. Her participation was always well timed and given in a manner that moved the class forward without confusing or intimidating her classmates. Based on her excellent performance, I hired her as my research assistant for the summer on a project concerning how federal courts approach “parallel proceedings,” circumstances in which substantially the same parties are litigating similar claims in two or more forums at the same time, be they federal courts, state courts, or courts in other countries. She grasped a very complicated set of cases relatively well.

Based on this work and my conversations with Juliet, I recommend her highly. She is smart and possesses a fine work ethic. Her writing is clear. She was among the two most talented students in a class of twenty. While assisting me with my research, Juliet was diligent and responsive with none of the defensiveness some students display in responding to suggestions and criticisms.

On a personal note, I find Juliet naturally outgoing, even tempered, and considerate. She will be liked by other law clerks and other people in the courthouse with whom she interacts. After teaching for more than 25 years, I would place Juliet among the top 5% of my students. She is a catch! I am happy to answer any follow-up questions you may have.

Sincerely,

Paul R. Dubinsky
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WRITING SAMPLE #1

As a student in the Immigration Appellate Advocacy Clinic at Wayne State University Law School, I had the opportunity to represent a client in his appeal before the Board of Immigration Appeals (BIA). I co-wrote an appellate brief with a fellow student in the clinic. I have included an excerpt of the brief below. This excerpt includes argument sections of brief that I wrote. I also conducted the research for these sections. The excerpt also includes the Statement of Facts and the Procedural History sections of the brief for context. These sections were written by myself and my fellow classmate. A final edited version of the full brief was filed with the BIA in April 2023.

To preserve client confidentiality, I redacted names of all individuals. My supervising professor in the clinic, Professor Jonathan Weinberg, has granted me permission to use an excerpt of this brief as a writing sample.

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STATEMENT OF FACTS

For decades, the Colombian government has struggled to control the Revolutionary Armed Forces of Colombia - People's Army (FARC), formerly the country's largest guerilla insurgency group and dissident faction. Exh. 5 at 41. Despite government promises and attempts to establish peace, dissidents of the FARC and other armed groups continue to operate and are significant perpetrators of human rights abuses and violent crimes, including the killing, kidnapping, and threatening of human rights defenders. *Id*. at 30 and 43. In Colombia, human rights defenders who operate in specific municipalities and do essential work to assist the government in aiding victims of armed violence are commonly referred to as "social leaders." Exh. 4 at 46-47, 52-62, 66-83.

Despite a publicized effort to protect social leaders and other human rights defenders, the government struggles to properly investigate and successfully prosecute offenders responsible for these attacks. *Id*. at 32-33 and 54. Between 2016 and 2021, over 400 human rights defenders in Colombia were murdered. *Id*. The judicial system in Colombia is overburdened, inefficient, and corruption and the intimidation of judges, prosecutors and witnesses is an on-going concern. *Id*. at 39. Armed dissidents have infiltrated the ranks of government officials with the Attorney General of Colombia reporting that police officials have been formally accused of having ties with armed groups. *Id*. at 32. Some former paramilitary members are active in armed groups. *Id*. at 42.

Although a peace agreement was reached between the government and the FARC in 2016, FARC dissident numbers are currently increasing with attacks and threats against social

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leaders and innocent citizens also on the rise. Exh. 4 at 64. Nearly 13,000 FARC members initially engaged in reincorporation activities, with an estimated 800 to 1,500 failing to participate in disarmament. Exh. 5 at 41. While the number of armed dissidents was initially reduced following the peace accord, as of October 2021, the number of FARC dissidents grew to approximately 5,200 members as a result of new recruitment efforts and former members deciding to return to arms. *Id*. Some members who returned to arms allege that the Colombian government has failed to comply with commitments laid out in the peace accords by neglecting to reintegrate ex-members into Colombian society. *Id*. at 41-42. Ten FARC members were involved in a June 2021 attack against a military base, where 44 people were injured and the former President's helicopter was hit with gunfire. *Id*. In April of 2021, FARC dissidents kidnapped army lieutenant colonel Pedro Enrique Perez and held him in Venezuela. *Id*. at 43. There is also evidence to suggest that the FARC continues to recruit child soldiers to join its ranks. *Id*. at 44.

In response, many brave Colombians put their lives at risk by becoming social leaders to assist victims in regaining what the FARC has taken from them. Since social leaders are the people who stand up against FARC violence in their communities, they are regularly targeted by dissidents attempting to maintain and regain control. *Id*. at 70. The FARC's regrowth over the past two years has coincided with social leaders being murdered at ever-increasing rates. Exh. 4 at 46. In 2022, the number of murdered social leaders reached a record high since the peace agreement. *Id*. Human rights defenders report receiving threats in the form of email, mail, and telephone. *Id*. at 54. In some instances, the government provides protection for municipal human rights defenders threatened by the FARC and other armed groups, but activists claim that the

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government does not always take threats seriously. *Id*. at 25 and 54. In July of 2021, the Attorney General's office reported 961 active investigations into threats against human rights defenders, but only three convictions in these cases that year. *Id.* at 54.

A. February 2022: G began working as a social leader in the city of Pradera.

G was a social leader in the city of Pradera for approximately six months before he was forced to flee Colombia in August 2022. Tr. at 29. The mayor's office in the city appointed G for this volunteer position in February of 2022. Exh. 4 at 38-43 and Tr. at 54 and Exh. 1 at 11. There were many people living in Pradera who had been displaced by the FARC and needed assistance. Tr. at 55. G was selected because he had lived in Pradera for over 27 years, had established ties in the community, and knew the area well. *Id*. at 55. Prior to being appointed, G and his family provided food, money, and clothing to displaced people in the city. *Id*. at 56. He was passionate about this work and enjoyed helping people. *Id*. Additionally, he graduated with a law degree from Santiago De Cali University in 2019 and his legal education made him well-qualified for this role. His work specifically involved assisting displaced citizens to identify rights that had been violated by the FARC. *Id.* at 55. He answered questions about the law, assisted with relocation, and aided individuals in filling out government forms to reclaim lost land and apply for monetary subsidies Exh. 1 at 11-12.

B. March 2022: G began receiving threatening phone calls warning him to stop his work as a social leader, which he timely reported to the police.

On March 21, 2022, G received a concerning phone call from a private, unknown phone number. Exh. 4 at 9. The unidentified caller warned him to stop helping people and that if he did not obey, he would suffer the consequences. *Id*. The caller advised that the people in the rural

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area of Pradera did not need G's help as a social leader and that for his own good, he should stop meeting with these people and stop visiting the rural area. *Id*. G filed a report with the prosecutor's office on March 24th, received a case number by email, and was told that they would investigate the matter. *Id*. at 8-14. Despite being told that he would be updated about the investigation within five business days, G was never contacted.

On. March 28, 2022, G received another call from a private phone number. Exh. 4 at 28. During this phone call, the callers identified themselves as "dissidents of the FARC EP column Dagoberto Ramos" and told him that if he did not heed the warning that they had given him, they would attack him and his family. *Id*. Again, G filed a police report on March 29, 2022. *Id*. He emphasized in his March 29th report that this was not the first threatening phone call he received and that he was concerned for his safety and that of his family. *Id*. at 31. After the second phone call on March 28th, G went to stay with his parents in Palmira Valle, which is approximately 10 kilometers from Pradera. Tr. at 41-42. G did not receive a case number by email or any other confirmation after filing this report.

On May 17, 2022, while G was in Palmira Valle, he received a third threatening phone call. Exh. 4 at 16 and Tr. at 42. While the callers did not identify themselves during this call, they accused G of not heeding the first warning they had given him and again warned him "not to continue visiting the rural area of Pradera." G filed another police report on May 18th. Exh. 4 at 16. G was not provided an investigation number for this complaint. Rather, he received only an automatically generated confirmation email informing him of the new system being used to generate file numbers. *Id.* at 21. There is no evidence that the matter was ever investigated.

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After he heard nothing from the police regarding any investigation, G followed up by visiting the police station after filing the reports and requested an update. Exh. 1 at 15. He was told to wait. *Id*. There is no evidence to suggest that the matters were investigated further or that the police took any action to ensure G's safety.

C. August 2022: G survived an attack on his life.

On August 12, 2022, G and two others were at a farm owned by his grandfather located in the rural area of Pradera. Exh. 4 at 27. He planned to take a meeting there for his work as a social leader. Tr. at 38 and Exh. 4 at 27. While waiting, two men wearing helmets drove up to him on a motorcycle and shot at him. Exh. 4 at 27 and Exh. 1 at 14. G and his companions ran in fear for their lives and were able to escape and safely hide inside the house. Exh. 4 at 27 and Exh.1 at 16 and Tr. at 39. G hid in the house for three hours after that attack. Tr. at 39. That same day, G filed a police report describing the incident. Exh. 4 at 27. In this report, he mentioned the calls he had received several months earlier and how he believed that he was safe after reporting them to the police. *Id*. He emphasized in this report that he was scared for his life, that he was considering leaving the country, and that he was filing this police report so that the police can investigate the incident and provide help. *Id.* In response to that report, the police advised G to go into hiding and told him that they would investigate. Exh. 1 at 16. G left Pradera to stay with his aunt in Cali, a city 55 km from Pradera. *Id*. He did not receive a case number or any other confirmation after filing this report.

D. G fled Colombia and his sister began receiving threatening phone calls.

After the police failed to protect G from an attack on his life, he determined that his only option was to flee Colombia. Tr. at 41. He left Colombia on August 16, 2022. Tr. at 26.

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Shortly after G left, his sister, Ms. F, began receiving phone calls from people looking for her brother. Exh. 4 at 35. At first, she did not report these calls because she was afraid. *Id*. However, she filed a police report on September 23, 2022 after receiving a threatening phone call the day before. *Id*. at 33-37. During the September 22nd call, the caller identified himself as "dissidents of the extinct FARC EP Dagoberto Ramos." They insulted Ms. F, saying, "bitch daughter of a bitch tell that faggot that we will find him," and told her that they would find her brother and that he knows who they are. *Id*. at 35.

E. The Colombian government continues to lose control over the FARC and is unable to protect social leaders.

In 2022, over 199 social leaders and human rights defenders were murdered in Colombia, signifying a seven year high and exceeding the figures for 2021 and 2020. Exh. 4 at 47. In the short time since G left Colombia, the Colombian government has faced persistent obstacles in its struggle to control the FARC and protect social leaders. This past September, the Peace Commissioner, Danilo Rueda, confirmed popular doubt by admitting that he believed the government had failed to successfully kill FARC leader Ivan Mordisco. Exh. 4 at 51. In November, Human Rights Watch issued a report concerning the recent increase in murders of social leaders and the growth of armed groups. *Id*. at 57 and 78. President Gustavo Petro took office in August 2022 with a pledge to protect social leaders. *Id*. at 59. Despite this, 35 social leaders were murdered in 19 different departments within the first two months of his presidency. *Id*.

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Procedural History

In March 2020, two years before the events described above, G had entered the U.S. on a tourist visa. Tr. at 27. The pandemic broke out shortly after his arrival, and he was stranded here; his flights home were canceled repeatedly. *Id*. and Exh. 1 at 9. He applied for an extension of his visa, but ultimately ended up overstaying his visa and working without authorization. *Id*. at 28. He was able to return to Colombia in early 2021. About a year after that — and just a week before he began work in Pradera as a social leader — he attempted once again to visit the U.S. to visit his wife, but was placed in expedited removal because his earlier overstay and unauthorized work had voided his visa. 8 U.S.C. sec 1202(g). Tr. at 27 and Exh. 5 at 14.

It was upon his return to Colombia, after his removal, that he began his work as a social leader and the FARC began its campaign of threats against him. Tr. at 29. Six months later, after the FARC attempted to kill G and he fled Colombia, he no longer had a valid visa to enter the U.S. Tr. at 28. Accordingly, he entered without authorization, expressed a fear of returning to Colombia, and passed a credible fear interview. Exh. 1 at 6-26.

G's first hearing in immigration court took place on October 17, 2022. Tr. at 1-5. G was found to be only eligible for withholding of removal and protection under the Convention Against Torture due to the reinstatement of his prior expedited removal order. *Id*. at 3-4. During this hearing, the Immigration Judge informed G of his right to seek counsel and that the court clerk would provide him with a list of legal service providers. *Id*. at 2. The Immigration Judge explained the forms of relief G was eligible for and answered questions. *Id.* at 3. The Immigration Judge asked G if he needed time to look for an attorney and G said yes. *Id.* at 4. He elaborated: "Your Honor, I was in communication with an attorney and they are actually

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reviewing my case at this time." *Id*. The Immigration Judge continued G's case for thirteen full days- the equivalent of nine business days- and directed G to "make sure that [his] attorney knows the next hearing date" and to "have his application completed by then." *Id*.

G did not fill out an application between his October 17th and October 31st hearings. He returned on October 31st without counsel. The hearing began:

> Q. " Sir, I had reset your case from October 17th because you told me you had an attorney reviewing your case. So I gave you time to see if that attorney was going to represent you, but in that time, I have not received any entry by an attorney. Were you expecting an attorney to show up for your hearing today?" Tr. at 6.
>
> A. "Your Honor, I was talking to an attorney and we had agreed that he was going to do my case. He asked for 11,000 and —" *Id*. at 6-7.
>
> Q. "Okay. Sir, do you have an attorney you were expecting to show up today, yes or no?" *Id*. at 7.
>
> A. "No, Your Honor." *Id*.
>
> Q. "Okay. I had reset your case to give you time to see if that attorney was going to enter your case. So are you going to handle your case on your own?" *Id*.
>
> A. "Yes, Your Honor." *Id*.

The Immigration Judge then directed G to fill out his Form I-589 on his own, and G answered that he understood. *Id*. at 8.

G filed an application for withholding of removal and protection under the Convention Against Torture on November 16th. Tr. at 11. He returned to court on November 21, 2022. *Id*. at 10-18. During this hearing, the Immigration Judge set a merits hearing for January 5, 2023. *Id*.

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At his merits hearing on January 5, the Immigration Judge denied G's applications for withholding of removal and CAT after determining that G did not suffer past persecution, did not establish that the Colombian government is unwilling or unable to protect him, and that he could internally relocate in Colombia. *Id*. at 58-60.

SUMMARY OF ARGUMENT

G received three death threats and survived an assassination attempt in Colombia on account of his work as a social leader. The record is plain that he suffered past persecution, and that this persecution was at the hands of the FARC. The record demonstrates that although the government may be willing to protect G from the FARC's persecution, it is unable to do so. The Immigration Judge committed legal error in ruling otherwise. DHS did not carry its burden of showing that G could safely relocate elsewhere in Colombia. Finally, the Immigration Judge denied G's right to counsel by neither granting him adequate time to find counsel nor securing an appropriate waiver of the right.

ARGUMENT

I. G IS ENTITLED TO WITHHOLDING OF REMOVAL.

G was a social leader in the town of Pradera, Colombia. In retaliation for his political opinion and his work as a social leader, elements of the terrorist FARC threatened his life and attempted to kill him. The Colombian government was and is unable to ensure his protection.

A. G Suffered Past Persecution in Colombia.

An applicant seeking withholding of removal must prove that it is more likely than not that he will be persecuted on account of his race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. 241(b). When an applicant establishes that he has

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suffered past persecution on account of a protected ground, there is a presumption that he will be persecuted if returned. 8 C.F.R. 241(b)(1)(i).

i. The harm that G suffered rose to the level of persecution.

The Ninth Circuit has made clear that "[d]eath threats in combination with being closely confronted by armed assailants establishes past persecution." *Garces v. Mukasey*, 312 F. App'x 12, 17 (9th Cir. 2009). See also *Antonio v. Garland,* 58 F.4th 1067, 1073 (9th Cir. 2023) (threats without more can be past persecution, "particularly when they are specific and menacing and are accompanied by ... violent confrontations, near-confrontations and vandalism") (quoting *Mashiri v. Ashcroft*, 383 F.3d 1112, 1119 (9th Cir. 2004).

G satisfies this test. He was appointed to this position by the mayor's office in Pradera and was tasked with assisting victims of FARC violence. Exh. 4 at 38-43 and Tr. at 54 and Exh. 1 at 11. While he held this position, the FARC threatened G on three separate occasions. *Id*. at 9, 28, 16. Eventually, two FARC dissidents attempted to shoot and kill G while he was waiting to meet victims of FARC violence outside his grandfather's house. *Id*. at 27 and Exh. 1 at 14. After G left Colombia, the FARC called his sister. Exh. 4 at 35. They demanded her brother's whereabouts, and promised that they would find him. *Id*. at 33-37. Other social workers throughout Colombia are frequently threatened and killed by FARC dissidents. Exh. 4 at 70. The type of harm suffered by G is similar to the harm inflicted by the FARC on social leaders and human rights activists throughout Colombia. *Id*. at 54.

The Ninth Circuit has found past persecution even in cases where the facts were less disturbing. In *Garces v. Mukasey*, the court found past persecution where a Colombian human rights activist received death threats by phone, her house was shot at while she was away, and an

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armed assailant pointed a gun at her, because she was "closely confronted and put in harm's way." 312 F. App'x 12., 17. G's situation was more dire than that: he was nearly killed in an assassination attempt. Exh. 4 at 27.

The fact that G was forced to flee Colombia shortly after he was nearly killed by the FARC is itself evidence of past persecution. The Ninth Circuit has held that "being forced to flee from one's home in the face of an immediate threat of severe physical violence or death is squarely encompassed within the rubric of persecution ...." *Mendoza-Pablo v. Holder,* 667 F.3d 1308, 1314 (9th Cir. 2012); see also *Singh v. Garland*, 57 F.4th 643, 653 (9th Cir. 2022), *Flores Molina*, 37 F.4th at 633–34, 634 n.3; *Knezevic v. Ashcroft*, 367 F.3d 1206, 1211–12 (9th Cir. 2004).

The Immigration Judge found G to be credible. I.J. at 6. He gave G's testimony full weight with respect to the fact that these incidents occurred and that he reported the incidents to authorities. *Id.* Based on this credibility determination, the nature of the threats received, and the eventual attack on G's life, the record establishes that the harm suffered rose to the level of persecution.

ii. G was persecuted by the FARC on account of his political opinion and his membership in the particular social group of "social leaders."

It is undisputed that G received repeated threatening phone calls. The Immigration Judge expressed some doubt whether they all came from the FARC. The record establishes that they did.

G began work as a social leader in February of 2022. Exh. 4 at 9, 28, 16. He received the first threatening phone call on March 21st, the second on March 28th, and the third on May 17th that same year. *Id*. The content of the calls was the same or similar. The first caller referenced

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G's work as a social leader in rural Pradera. *Id.* at 8. The second caller identified himself as a dissident of the "FARC EP column Dagoberto Ramos" and referenced the threat made in the first call. *Id*. at 28. The third caller mentioned G's work in rural Pradera and again referenced the threat made in the first call. *Id*. at 16. All three callers threatened G to heed the warning to stop his work as a social leader in Pradera or suffer the consequences. *Id*. at 9, 28, 16. After G fled Colombia, the FARC called his sister and threatened her. The caller again identified himself as "FARC EP column Dagoberto Ramos." *Id*. at 35. They asked for G's location and warned Ms. Silva Forero that they would find her brother. *Id*. The content of the calls, unquestioned by the Immigration Judge, established that they all came from the same source and that that source was the FARC.

The Immigration Judge ignored the FARC's call to G's sister in his decision. Indeed, his questioning of G during the hearing suggests that he was not aware of that later call at all. If any further evidence of the source of the earlier calls were needed, though, the later call establishes it.

The Ninth Circuit has found persecution to "be on account of political opinion when there is no other logical reason for the persecution at issue" see *Navas v. INS*, 217 F.3d 646, 657 (9th Cir.2000). It has inferred mistreatment on account of political opinion in the absence of any other logical explanation. *Li v. Holder*, 559 F.3d 1096, 1112 (9th Cir.2009). In this case, there is no evidence to suggest that other actors were concerned with stopping G from assisting FARC victims in Pradera. The Immigration Judge did not ask G if he had any reason to believe that someone else, besides the FARC, could be responsible for the threats or the attack. He did not

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reference any evidence on the record suggesting other potential culprits. On the contrary, G did not have problems with anyone other than the FARC. Exh. 1 at 11.

Again, *Garces v. Mukasey* is instructive. In that case, there was some ambiguity as to whether the same armed group was responsible for multiple events. Although Garces admitted that she did not conclusively know who shot at her house and no evidence linked the death threats to the shooting incident, the court found that there was a reasonable inference that the incidents were related given their temporal proximity. 312 Fed.Appx.12 at 13. The court was further persuaded by the fact that presumption to the contrary amounted to an unreasonable reading of the record. *Id.* at 17.

Finally, in assessing whether the FARC was responsible for the shooting, the Immigration Judge referenced G's failure to inform police about the presence of two witnesses during the August 12th assassination attempt. I.J. at 10. The Immigration Judge stated that because he did not understand G's apparent failure to mention the witnesses to the police, he would afford this element of the persecution "less weight." *Id*.

This was legal error. It is plain – indeed undisputed – that the shooting took place. The Immigration Judge had already stated that he gave "full weight with respect to the fact that those incidents occurred and [that G] did report them to authorities". *Id*. at 6. The record included not only G's testimony, explicitly found to be credible, but also a contemporaneous police report. The fact of the shooting is not in doubt. In that circumstance, the Immigration Judge had no authority arbitrarily to decide that he would not give full "weight" to the shooting. "[W]hen a petitioner testifies credibly 'the question remaining to be answered becomes whether [those] facts, and their reasonable inferences, satisfy the elements of the claim for relief.'" *Garces v.*

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Mukasey, 312 F. App'x 12, 15 (9th Cir. 2009) (quoting *Ladha v. INS*, 215 F.3d 889, 900 (9th Cir.2000)). The record demonstrates that the FARC was responsible for the shooting and the threats.

B. The Colombian Government was and is unable to protect G from the FARC

Notwithstanding the promises of the Colombian government to protect social leaders, over 199 social leaders and human rights defenders were murdered in Colombia in 2022. Exh. 4 at 47. This number signifies a seven year high and exceeds the figures for 2021 and 2020. *Id*. Despite the government's promise for peace in 2016, FARC dissident numbers are currently on the rise. Exh. 4 at 64. As of October 2021, the number of FARC dissidents grew to approximately 5,200 members as a result of new recruitment efforts and former members deciding to return to arms. Exh. 5 at 41. Armed dissidents have infiltrated the ranks of government officials with the Attorney General of Colombia reporting that police officials have been formally accused of having ties with armed groups. *Id*. at 32. President Gustavo Petro took office in August 2022 with a pledge to protect social leaders. Exh. 4 at 59. Despite this, 35 social leaders were murdered in 19 different departments within the first two months of his presidency. *Id*. More than 400 human rights defenders were murdered from January 2016 to August 2021. Exh. 5 at 32-33. Reports document that the government struggles to properly investigate and successfully prosecute offenders responsible for these attacks. *Id*. at 32-33 and 54. The judicial system in Colombia is overburdened, inefficient, and corruption and the intimidation of judges, prosecutors and witnesses is an on-going concern. *Id*. at 39.

Like countless other human rights activists and social leaders in Colombia, the government failed to protect G from the FARC. G was an active and known social leader in

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Pradera. The FARC threatened him to stop his work as a social leader or suffer the consequences. In turn, G sought the protection of his government and filed police reports. He continued to do his work. Meanwhile, the police failed to take any effective action to shield G from FARC violence. As a result, the FARC targeted G and nearly killed him.

i. The government may be *willing* to protect G but this does not mean that it is *able* to do so.

The Immigration Judge conflated the government's willingness to protect G from the FARC with its ability to do so. An analysis that solely considers the government's willingness and not its ability to protect an applicant is legal error. *Madrigal v. Holder,* 716 F.3d 499, 506 (9th Cir. 2013).

The Immigration Judge relied on G's ability to file police reports as evidence that the government was both willing and able to protect him. I.J. at 6-7. An applicant's ability to file a police report may suggest that the police were willing to provide protection, but it does not establish that they were able. *Afriyie v. Holder*, 613 F.3d 924 (9th Cir. 2010). Authorities who are capable of taking a report, may still be powerless to stop persecution, either because they lack resources or because of the persecution's character or pervasiveness. *Avetova–Elisseva*, 213 F.3d at 1198 cited in *Afriyie*. *Id*. The fact that the FARC nearly killed G after he filed three police reports demonstrates that the police were unable to protect him.

In *Madrigal v. Holder,* the Ninth Circuit remanded the case because "the agency cited various statistics on the efforts of the ... government to combat drug violence' but failed to 'examine the efficacy' of those efforts." 716 F.3d at 506–07 (quoted in *Quijano Serrano v. Barr*, 830 F. App'x 879 (9th Cir. 2020)). The Immigration Judge cites country reports indicating the government's efforts to control the FARC, but does not assess evidence on the record calling the

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efficacy of these efforts into question. In doing so, the Immigration Judge solely focused on evidence demonstrating the government's willingness, but not its ability to control the FARC. "[O]ur law is clear that the agency ... must examine all the evidence in the record that bears on the question of whether the government is unable or unwilling to control a private persecutor." *Quijano Serrano v. Barr,* 830 F. App'x 879, 880 (9th Cir. 2020) (quoting Davila, 968 F.3d at 1143). The Immigration Judge cited President Gustavo Petro's vow to protect social leaders, the holding of a security council meeting in response to violence, expressions of government solidarity with victims, and government demands on the FARC to exclude civilians from armed conflict with the government. I.J. at 11. Yet none of those expressions of willingness negate the government's inability to control. Murder rates of social leaders reached a seven year high in 2022. Exh. 4 at 47. The number of FARC dissidents has reached a record high since the peace accord, increasing more than two-fold in 2022. The FARC attacked a military base in 2021. The former president himself was almost killed by FARC gunfire during that attack. *Id*. at 41-42

The Immigration Judge cited, as evidence of the government's ability to control, a newspaper article reporting the Colombian government's claim that it had killed armed FARC dissident leader "Mr. Vera." I.J. at 8. In fact, "Mr. Vera" is very much alive, and still at large. Exh. 4 at 51.

ii. G's ability to file police reports does not demonstrate that the government is willing and able to protect him from the FARC.

G promptly filed police reports after each threatening phone call from the FARC. Exh. 4 at 8, 28, 16. He filed a final police report the same day the FARC tried to kill him. *Id.* at 27. His sister filed a police report after she received a threatening phone call. *Id*. at 33-37. The fact that police reports were filed and the government issued case numbers in response to two reports is

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insufficient to demonstrate the government's ability to protect G from the FARC. The authorities' response to requests for police protection or lack thereof provides powerful evidence in assessing the government's willingness or ability to provide protection. *Afriyie v. Holder*, 613 F.3d 924 (9th Cir. 2010).

G filed four police reports. The authorities responded to the March 21st report and the May 17th report by email. Exh. 4 at 11-14 and 18-23. The authorities' email responses are inconsistent. They did not send email responses to the reports G filed for the March 28th call and the August 12th attack.

The Immigration Judge characterized the email response to the May 17th report as part of an actual police investigation – as a request that G provide more information. I.J. at 11. This was incorrect. That email was simply an automated feature of the new processing system the authorities used for generating case file numbers. Exh. 4 at 18-24.

The email in response to the March 21st call instructed G that he would receive information within five working days. Id. at 11-14. G did not receive further correspondence from the authorities within five working days. In fact, the police made no attempts to contact G to follow-up on any investigations. Concerned, G went to the police station to follow-up. Exh. 1 at 15. He was told to wait. *Id*.

"The government's mere decision to remit a matter for criminal investigation, without further evidence that the referral amounted to arrests, prosecutions, or other action to minimize threats, is insufficient to demonstrate the government's willingness or ability to protect." *Antonio v. Garland*, 58 F.4th 1067 (9th Cir. 2023). "Some official responsiveness to complaints of violence, although relevant, does not automatically equate to governmental ability and

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willingness." *J.R. v. Barr,* 975 F.3d 778, 782 (9th Cir. 2020). "[T]he question is whether the government both 'could and would provide protection' from private persecutors." *Rahimzadeh*, 613 F.3d at 923 (emphasis added)." *Id*. at 783. In *J.R. v. Barr,* the Government briefly imprisoned gang members who cut off respondent's fingers and provided respondent with protection while he testified against the gang member who murdered his son. *Id*. at 782-83. The Ninth Circuit held that this was insufficient to demonstrate that the government was able and willing to protect respondent because respondent was shot and threatened at after the arrests and the government withdrew protection after respondent testified. *Id*. at 783. Similarly, in *Quijano Serrano v. Barr*, the Ninth Circuit found the government's action to be deficient where the police imprisoned one gang member, but later, other gang members successfully pressured the respondent to stop cooperating with police out of fear for his life. 830 F. App'x 879, 880.

G was an appointed social leader. He put the authorities on notice that the FARC was threatening him by filing four police reports. In response, the police did nothing more than send him an automated email response with a case number to two of the four reports. There is no evidence to suggest that the police launched an investigation or conducted any arrests or prosecutions in response to the threats reported by G. There is also no evidence to suggest that the police made any attempts to provide G with protection. Despite his persistent efforts to seek protection from the government, the FARC was able to target G and nearly killed him. The failure of the government to protect a complaining petitioner indicates that the government either would not or could not control the persecutor. *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir.1996). The FARC's continued ability to target G even after he had filed three police reports makes it clear that the government failed to protect him.

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The Colombian government's failure to provide protection is not unique to G. Country conditions information demonstrates that there is a widespread failure on the part of the government to protect social leaders, human rights activists, and even high government officials from FARC violence. Exh. 4 at 48, 52-54, 57, 59, 61, 67, 71, and 79.

iii. G was not required to remain in Colombia to await the findings of a potential police investigation to demonstrate the government's inability to protect him.

G fled Colombia four days after the FARC tried to kill him and four days after he filed a final police report documenting the attack. Tr. at 26. The Immigration Judge stated that G's failure to wait in Colombia for the findings of a potential police investigation into the shooting meant that there was no evidence of inability to protect. I.J. at 7.

The Ninth Circuit has made clear that when the record demonstrates an unwillingness or inability on the part of the government to protect an applicant the "law does not require applicants to wait until [persecutors] carry out their deadly threats before they are eligible for asylum." *J.R. v. Barr,* 975 F.3d 778, 784 (9th Cir. 2020). G filed three police reports documenting the FARC's threats in the months leading up to the attack. Exh. 4 at 8, 28, 16. These reports proved to be futile because the police took no action to investigate the threats or to provide G with protection. Eventually, the FARC targeted G outside his grandfather's house and nearly killed him. Exh. 4 at 27.

"[A]n applicant who seeks to establish eligibility for withholding of removal [...] need not have reported that persecution to the authorities if he can convincingly establish that doing so would have been futile [...]." *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006). G was under no obligation to file a final report, given the demonstrated futility of the first three.

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He did so anyway. He was not required to stay in Colombia to await the findings of what the record proves to be another futile police report.

The record shows that the police corresponded with G over email in response to two of the four reports. Exh. 4 at 11-14 and 18-23. Presumably, had the police taken further action or required additional correspondence after the shooting, they could have communicated by the same means regardless of G's physical location. Since he left Colombia, G has not received further correspondence from police regarding an investigation. A month or so after he left Colombia, G's sister received a threatening phone call from FARC members looking for her brother. Exh. 4 at 33-37. She filed a police report. *Id.* There is no evidence to suggest that the police launched an investigation or arrested any individuals in response to this threat.

C. G's life would still be in danger if he relocated within Colombia.

(This section of brief was written by a fellow student in the clinic and is redacted from this excerpt)

B. G was Denied his Right to Seek Counsel

G's case should be remanded because the Immigration Judge deprived him of his right to seek counsel. After G expressed a desire to hire a lawyer, the Immigration Judge neither afforded him reasonable time to find one, nor secured a knowing and voluntary waiver of his right to do so.

i. G had a right to seek counsel in proceedings before the Immigration Judge.

"The Supreme Court has long recognized that because deportation 'visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom[,] ... [m]eticulous care must be exercised lest the procedure by which [an alien] is

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deprived of that liberty not meet the essential standards of fairness.' Bridges v. Wixon, 326 U.S. 135, 154, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945). One way the law ensures that the "standards of fairness" are met is by guaranteeing that aliens have the opportunity to be represented by counsel. "[T]he high stakes of a removal proceeding and the maze of immigration rules and regulations make evident the necessity of the right to counsel. The proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate." *Castro–O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir.1988) (quoted in *Biwot v. Gonzales,* 403 F.3d 1094, 1098 (9th Cir. 2005)). Accordingly, Congress recognizes the right to seek counsel as among the due process rights guaranteed to individuals subject to removal. *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004); see also 8 U.S.C. §§ 1229a(b)(4)(A).

"Although IJs may not be required to undertake Herculean efforts to afford the right to counsel, at a minimum they must inquire whether the petitioner wishes counsel, determine a reasonable period for obtaining counsel, and [...] assess whether any waiver of counsel is knowing and voluntary." *Biwot v. Gonzales,* 403 F.3d 1094, 1100 (9th Cir. 2005). When a respondent shows that he was denied the statutory right to seek counsel, he is not required to prove that he was prejudiced by the absence of the attorney. *Montes-Lopez v. Holder,* 694 F.3d 1085, 1093–94 (9th Cir. 2012).

ii. G was not provided with reasonable time to obtain counsel.

"In the absence of a knowing and voluntary waiver of the privilege of legal representation, a denial of a continuance to seek such representation results in the denial of the respondent's statutory and regulatory privilege". Matter of C-B-, 25 I&N Dec. 888 (BIA 2012). Immigration Judges must provide aliens with reasonable time to locate counsel and permit

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counsel to prepare for the hearing. *Rios–Berrios v. INS,* 776 F.2d 859, 862–63 (9th Cir.1985). The inquiry for determining what constitutes reasonable time is fact-specific and varies from case to case. *Biwot v. Gonzales*, 403 F.3d 1094, 1099 (9th Cir. 2005). Case specific factors to be considered include "the time frame of the requests for counsel; the number of continuances; any barriers that frustrated a petitioner's efforts to obtain counsel, such as being incarcerated or an inability to speak English; and whether the petitioner appears to be delaying in bad faith". *Id*.

The Immigration Judge provided G with one continuance of thirteen days to seek counsel. Tr. at 4. This amounted to nine working days. G was in detention throughout the duration of his removal proceedings. His access to the phone and the internet was restricted. G's detention further restricted his ability to reach out to friends or family members to request assistance. Additionally, G does not speak English. Despite these obstacles, he was able to make contact with an attorney who was willing to take on his case. *Id*. at 7. Unfortunately, this attorney requested $11,000 in exchange for representation, which was far beyond what G could afford. *Id*. There is no evidence to suggest that G was delaying his case in bad faith.

The timeframe of thirteen days, amounting to only nine working days, was under the circumstances unreasonably short. A national study published in the University of Pennsylvania Law Review shows that from 2007 to 2012 the average length of continuances afforded to detained clients to seek counsel was 24 days. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 36 n.137 (2015). In *Ram v. Mukasey*, the Ninth Circuit found that Mr. Ram had been denied the right to seek counsel notwithstanding that the Immigration Judge had continued his case twice, giving him over six weeks to find an attorney before his merits hearing. 529 F.3d 1238, 1240. In *Usubakunov v.*

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Garland, the Ninth Circuit found that a detained respondent had been denied his right to seek counsel notwithstanding continuances from December until May. *Usubakunov v. Garland*, 16 F.4th 1299, 1301 (9th Cir. 2021). In *Reyes-Palacios v. U.S. I.N.S*, the Ninth Circuit found that the detained respondent had been denied his right to seek counsel notwithstanding repeated continuances beginning on May 1, with a final merits hearing on July 24. 836 F.2d 1154, 1155. In *Castro-O'Ryan v. U.S. Dep't of Immigr. & Naturalization,* the Ninth Circuit found that the detained respondent had been denied the right to seek new counsel notwithstanding a gap of more than seven weeks between his initial counsel's withdrawal and his merits hearing. 847 F.2d 1307, 1309.

iii. G did not voluntarily waive his right to seek an attorney.

"In order for a waiver to be valid, an IJ must generally: (1) inquire specifically as to whether petitioner wishes to continue without a lawyer; see *Reyes–Palacios v. INS*, 836 F.2d 1154, 1155–56 (9th Cir.1988); *Colindres–Aguilar v. INS*, 819 F.2d 259, 261 (9th Cir.1987); *Castro–Nuno v. INS*, 577 F.2d 577, 579 (9th Cir.1978); and (2) receive a knowing and voluntary affirmative response. See *Castro–O'Ryan v. IN*S, 847 F.2d 1307, 1313 (9th Cir.1988); *Colindres–Aguilar,* 819 F.2d at 261; *Rios–Berrios v. INS*, 776 F.2d at 863." *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004)). "[E]ven for the most competent alien, the IJ has an affirmative duty to assess whether any waiver of counsel is knowing and voluntary." *Ram v. Mukasey*, 529 F.3d 1238, 1242 (9th Cir. 2008).

In *Ram v. Mukasey,* when Mr. Ram appeared without an attorney after a month-long continuance, the Immigration Judge asked whether Ram had succeeded in finding a lawyer, and, being told no, asked: "Well, how do you – are you ready to proceed with your case and enter

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pleadings?" Mr. Ram answered yes, and the Immigration Judge granted him a further continuance to prepare, given that an additional charge had been entered against him. *Id*. at 1240. At the next hearing, he asked again whether Ram was ready to proceed, to which Mr,. Ram answered yes. *Id.*

The Ninth Circuit held that that the IJ violated Ram's right to secure counsel. "The IJ neither asked [Ram] whether he wished to proceed without an attorney nor determined whether there was good cause to grant [him] more time to obtain counsel." *Id*. at 1242 (quoting *Biwot v. Gonzales*, 403 F.3d 1094, 1100 (9th Cir. 2005)). "[A]t no time did [the Immigration Judge] direct any questions to [Ram] concerning the implications of' proceeding without an attorney." *Id*. (quoting Tawadrus, 364 F.3d at 1104). The court stressed: "Making these inquiries is not a Herculean effort, and by not doing so, the IJ failed adequately to assess whether the waiver by Ram was knowing and voluntary." *Id*.

As in *Ram*, the Immigration Judge did not properly assess whether G voluntarily waived his right to seek counsel, and did not determine where there was good cause to grant him more time. G expressed a desire to retain counsel at his first two hearings. Tr. at 4 and 6-7. When he returned to his second hearing without counsel, he attempted to explain to the Immigration Judge that he spoke with an attorney who had agreed to take his case, but that he was unable to retain him at the rate of $11,000.00. *Id*. at 6-7. Rather than allowing G to fully explain his situation, the Immigration Judge interjected with two leading questions: "(...) do you have an attorney you were expecting to show up today, yes or no?" and "So are you going to handle your case on your own?" *Id*. at 7.

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When the record reflects a respondent's desire to be represented, "the IJ should not assume that silence or a failure to affirmatively request counsel is a de facto waiver." *Tawadrus v. Ashcroft,* 364 F.3d 1099, 1104 (9th Cir. 2004). G was unaware that he had the right to request more time to seek counsel during his second hearing. The Immigration Judge's suggestive questioning left G to assume that he had no choice but to proceed on his own.

Without counsel, G relied on the judge for information regarding his eligibility for relief and the process for filing applications and evidence throughout the first two hearings. At certain points, the Immigration Judge took on the role of educator, explaining the rules and procedures to G and answering his questions. Tr. at 2-4, 7-10, 13-18. In this context, G's response of "Yes, Your Honor" was far from a voluntary waiver of a right of a right and reads more like a compulsory response to the Immigration Judge's instruction to follow a rule.

Accordingly, this case must be remanded so that G can be afforded an adequate opportunity to secure counsel.

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WRITING SAMPLE #2

As a first-year law student in Legal Research and Writing class, I was assigned to write a fictional brief in support of plaintiffs' opposition to defendants' motion for summary judgment. The fictional plaintiffs, members of a church, sought relief under the Religious Freedom Information Act (RFRA) after federal agents seized psilocybin mushrooms from the church and threatened criminal sanctions. The church considers these mushrooms to be holy sacrament and uses them in religious ceremonies. I have included an excerpt from the argument section of this brief here.

I. The Government violated the Religious Freedom Restoration Act ("RFRA") when it seized the Church's sacrament and threatened the Church with sanctions.

The Government violated RFRA when it entered Church property, seized holy sacrament, and threatened the Church with criminal and civil sanctions. RFRA prohibits the Government from substantially burdening a person's exercise of religion unless the Government can demonstrate that "the application of the burden to the person represents the least restrictive means of advancing a compelling interest." 42 U.S.C. §2000bb-(1)(b). Congress enacted RFRA in response to the Supreme Court's holding in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, wherein the Court held that the Free Exercise Clause of the First Amendment does not prohibit the Government from placing a burden on religious exercises through the application of generally applicable laws. 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). This holding overruled prior Court interpretations of the Free Exercise Clause in *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L.Ed.2d 965 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed. 15 (1972).

Congress responded to the Supreme Court's holding in *Smith,* by enacting RFRA which establishes a statutory rule that the Government is not permitted to substantially burden a person's exercise of religion "even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). RFRA was primarily motivated by Congress' recognition that " laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." § 2000bb(a)(2).

The only exception to the protection offered under RFRA requires that the Government meet a compelling interest test by demonstrating that the application of the burden to the person is (1) in furtherance of a compelling federal interest; and (2) is the least restrictive means of furthering that compelling interest. § 2000bb-(1)(b). Although the language of RFRA was significantly influenced by Supreme Court holdings in *Sherbert* and *Yoder,* Congress intended that RFRA provide broad protection for religious liberties beyond what the Supreme Court held to be constitutionally required. *Burwell v. Hobby Lobby Stores*, *Inc.,* 134 S. Ct. 2751 (2014) at 2767.

The Church practices Mazatec religious customs, traditions and rituals, which includes the sacred cultivation and consumption of mushrooms as the primary means to speak to the divine. Rodriguez Dep. 3, 2021. The Aztecs, ancient ancestors of the Mazatecs, used entheogens in their religious practices as far back as 5000 B.C. *Id*. The Church's continued use and cultivation of psilocybin mushrooms is an essential component of the Church's exercise of its faith and constitutes a sincere religious exercise. The Government's seizure and threats of future seizure and criminal and civil sanctions substantially burdens Church members' free exercise of their religion by forcing Church members to either relinquish their relationship with God or face Government sanction. The Government fails to prove that it has a compelling interest in prohibiting the Church from using and cultivating sacramental mushrooms that outweighs that Church members' fundamental right to exercise their religion. Additionally, the Government cannot demonstrate that a complete mandate on the Church's use of sacred mushrooms is the least restrictive means of maintaining a compelling Government interest.

("Argument A: The Government's threats to seek criminal/civil sanctions and asset forfeiture against the Church for its sacramental use and cultivation of mushrooms has substantially burdened a sincerely held religious exercise" is redacted from this excerpt)

B. The Government does not have a compelling interest in prohibiting the Church's use of sacrament and fails to demonstrate that total prohibition of the Church's use of mushrooms is the least restrictive means to achieve a federal interest.

Once claimants establish that Government action places a substantial burden on their sincere exercise of religion, the action may still be permitted under RFRA only if the Government "demonstrates that the application of the burden to the person is the furtherance of a compelling Governmental interest; and (2) is the least restrictive means of furthering that compelling Government interest." §2000bb-(1)(b). The Government bears a heavy burden and is required to demonstrate with both evidence and persuasion that the application of the burden would, more likely than not, be justified by the asserted interest. *Gonzales v. O Centro Esp. Benef. Uniao Do Vege*, 126 S.Ct. 1211 (2006) at 1219. In the case at bar, the Government fails to meet its heavy burden.

1. There is no evidence to suggest that granting an exception to the Church would have an adverse effect on the Government's ability to enforce the Controlled Substances Act.

Under RFRA, Congress adopted the compelling interest test initially proposed in *Sherbert* and *Yoder*, which aims to strike "sensible balances between religious liberty and competing prior Government interests." §2000bb(b)(1); §2000bb(a)(5). Under this test, the Government must present evidence to establish that granting an exemption under RFRA would cause grave and adverse harm to the maintenance of a compelling federal interest. *Yoder,* 92 S.Ct . at 236. Invocation of general Government interests, standing alone, is not sufficient. *Gonzales,* 126 S.Ct. at 1225. The test requires that the Government demonstrate that the compelling interest is "beyond broadly formulated interests justifying the general applicability of Government mandates." *Id*. at 1220. To succeed in establishing a compelling federal interest under RFRA, the facts of the case "must specifically identify an actual problem in need of solving" and demonstrate that inhibiting the claimant's religious exercise is "actually necessary to the solution." *U.S. v. Christie*, 825 F. 3d 1048 (9th Cir. 2016) at 1057 (citing Brown v. Ent Merchants Ass'n, 564 U.S. 786, 131 S. Ct. 2729, 180 L.Ed. 2d 708 (2011)).

In *Yoder*, the Court reasoned that although the State of Wisconsin had a "paramount" interest in education, the Court must specifically examine what if any impediments to the State's interest in education would flow from recognizing the Amish exemption. *Yoder,* 92 S.Ct. at 1536. The Court cautioned that when freedoms of religion are at stake, it must resist the imposition of sweeping claims, despite their admitted validity in the generality of cases. *Id*. Through an analysis of the facts concerning the Amish communities' relationship to education and a detailed examination of the Government's concerns with inhibiting Amish youth from procuring secondary education, the Court held that the Amish exemption did not invariably inhibit the State from maintaining its interest in education. *Id*. at 1540. The Court held that although the State's interest in education was strong, the strength of this interest did not overbalance the Amish community's right to freely exercise its religion. *Id*. at 1533.

Similarly, in *Gonzales v. O Centro Esp*, the Supreme Court did not find a compelling interest and stated that a "mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act cannot carry the day." 126 S.Ct. at 1221. In this case, a Christina Spiritist sect sought an exemption under RFRA for their practice of receiving communion through *hoasca*, a sacramental tea containing DMT, which is listed in Schedule I of the Controlled Substances Act (CSA). *Id.* at 1217. The Government argued that it had a compelling interest in prohibiting the sect's use of *hosaca* because it has a responsibility to protect the health and safety of members of the sect and to prevent diversion of the tea from the church to recreational users. *Id.* at 1220. The Supreme Court rejected the Government's arguments by applying the compelling interest test. The court stressed, the CSA does not call for a uniform application of its provisions, as the statutory language contemplates exempting certain people from its requirements when "consistent with public health and safety." *Id.* at 1221. To further support this point, the Court compared the regulatory exemption for Native American Tribes' sacramental use of peyote – a Schedule I substance, with the sect's use of *hoasca*. *Id.* at 1222. The peyote exemption had been approved 35 years prior and the Court noted that there is no evidence that this exemption has undercut the Government's ability to enforce the ban on peyote use by non-Native Americans. *Id*. Despite the Government's concerns with the health risks associated with DMT, the Court concluded that these risks are no less extreme than the risks associated with mescaline in peyote. *Id*. Given the lack of evidence supporting the Government's diversion argument, the Court did not find a compelling reason to enforce a double standard by precluding the sacramental use of *hoasca. Id*.

In contrast, in *U.S. v Christie*, the 9th circuit held that the Government had a compelling interest in prohibiting the Hawaii Cannabis Ministry from distributing large quantities of cannabis to people who visited the Ministry. *U.S. v. Christie*, 825 F. 3d at 1057. In this case, two ministers of a community where Cannabis was celebrated as a sacrament, sought protection under RFRA after they had been charged with criminal offenses under the CSA. The Court's holding on the compelling interest test was influenced by clear evidence that the Ministry had made no effort to limit distribution of cannabis to church members. *Id*. In fact, the evidence showed that the Ministry had obtained cannabis from the black market and

implemented procedures to make cannabis readily available to the general public and minors. *Id*. at 1053. Since there was a clear link between the Ministry's activities and the diversion of the cannabis from the Ministry to recreational users, the court held that the Government's compelling interest in inhibiting the recreational use of cannabis under the CSA would be severely impacted if the Ministry was granted an exception under RFRA. *Id*. at 1057.

In the instant case, the Government fails to show that it has a compelling interest that overbalances that Church's right to exercise its religious sacrament. The Government fails the compelling interest test set out in *Yoder* because there is no concrete evidence to establish that granting an exemption for the Church would have an adverse effect on the Government's ability to enforce the CSA. The Government will attempt to contrast the instant case from *Yoder* by alleging that permitting an exception to the Church's use of mushrooms may harm the physical and mental health of both Church members exercising their sacrament and non-Church recreational users. As mentioned previously, there is no concrete evidence on the record to suggest that any Church members have been harmed either physically or mentally after consuming the mushrooms. Moreover, as noted in Agent Goodman's Deposition, the Government's investigations on diversion into the non-Church community are ongoing and inconclusive. Goodman Dep. 3, 2021. The Government's inclination to link the Church's use of mushrooms with criminal incidents involving use of the drug in the surrounding Williams community remains purely speculative.

The Government's compelling interest argument in this case is analogous to that which was presented and rejected by the Supreme Court in *Gonzales* and the facts of this case are similar to *Gonzales* in key respects. As in *Gonzales,* the Church uses a Schedule I substance as sacrament in its religious rituals and ceremonies, and as in *Gonzales*, the Government's compelling interest argument rests on a "mere invocation of the general characteristics of a Schedule I substance" and "the general applicability of a Government mandate." *Gonzales,* 126 S.Ct. at 1221. The Government provides the court with a general finding report on the recreational use of psilocybin mushrooms that has no direct applicability to the case at bar. Ex. 1, Sep. 6, 2017. Any attempt by the Government to use this report to persuade the court by

pointing out health risks affiliated with consumption of mushrooms falls short. As held by the Supreme Court in *Gonzales*, an argument for generally applicability that solely presents the potentially dangerous side effects of a Schedule I substance is insufficient to carry the day. *Gonzales,* 126 S.Ct. at 1221. Moreover, the Government has no concrete proof linking the Church's use of mushrooms with recreational use in the surrounding community. The Government's argument merely asserts that a generally applicable law should be enforced at the expense of preserving the Church's right to exercise its religious freedoms. By relying on the established and longstanding success of the peyote exception, the Supreme Court rightfully rejected this argument in *Gonzales* and preserved the sect's fundamental right to exercise its religion. As a matter of stare decisis, the court has a duty to reach the same conclusion in the instant case.

This case is distinct from *Christie* is one significant respect. Unlike in *Christie* where there was clear evidence that the ministers were dispersing cannabis to non-church members, there is no evidence linking the Church's use of mushrooms with diversion into the non-Church community. Although the Government mentions incidents involving recreational use by teens in the surrounding community, there is no actual evidence linking these incidents with the Church. Goodman Dep. 3, 2021. According to Shaman Tiatoa, it would be considered sacrilegious for him to distribute mushrooms to non-church members. Tiatoa Dep. 6, 2021. Outside distribution and recreational use are strictly forbidden by the Church's code of conduct and the Code requires that all individuals who partake in the sacrament be adult members of the church in good physical and mental health. Mission and Code of Conduct. 1, 2021. Shaman Tiatoa takes adequate precautions to ensure that the mushrooms are guarded with a security system and there is no evidence to suggest that his security system has been successfully breached or that anyone in the church community has distributed mushrooms to non-church members. Tiatoa Dep. 6-7, 2021.

In the instant case, the Government's compelling interest argument rests on an assumption linking the Church's use of its sacrament with diversion into the non-Church community. As noted in *Christie*, the Government "must specifically identify an actual problem in need of solving" and demonstrate that

inhibiting the claimant's religious exercise is "actually necessary to the solution." *U.S. v. Christie*, 825 F. 3d 1048 (9th Cir. 2016) at 1057 (citing Brown v. Ent Merchants Ass'n, 564 U.S. 786, 131 S. Ct. 2729, 180 L.Ed. 2d 708 (2011)). The Governments fails to identify a problem in this case but still offers a severe solution that threatens Church members' fundamental rights to free exercise. This risk of diversion remains purely speculative and is a central issue of material fact still in dispute in this case. The court cannot, in good faith, make an assessment on the risk of diversion without proof that there is a link between the Church and criminal incidents in the surrounding community. Since the instant case requires the court to facilitate a proper factual and evidentiary analysis, it cannot be appropriately decided on a motion for summary judgment. As cautioned in *Yoder*, when freedoms of religion are at stake, courts must resist the imposition of sweeping and general claims, and carefully analyze the facts of each case in their proper context. *Yoder*, 92 S.Ct. at 1536.

2. The Government fails to demonstrate that a complete mandate on the Church's use of sacrament is the least restrictive means to ensure enforcement of the Controlled Substances Act.

In the unlikely event that there is a link between the Church and recreational use, the Government cannot establish that a complete mandate on the Church's use and cultivation of its sacrament is the least restrictive means of pursuing enforcement of the CSA. The least restrictive means test requires courts to conduct a comparative analysis between the mandate called for by the Government and other potential options which would still allow the Government to achieve its compelling interest without inhibiting the claimants' right to exercise their religion. *Christie*, 825 F. 3d. at 1061. The Government's high burden is two-fold in that it must, through evidence on the record, support its choice of regulation and "refute the alternative schemes offered by the challenger." *Id*. at 1061. In other words, the Government must prove that each alternative offered by its opponent is not the least restrictive means to achieve its compelling interest. The determination of the least restrictive means test is "necessarily fact-specific and context-dependent." *Christie*, 825 F. 3d. at 1062; *Gonzales,* 126 S.Ct. at 1211. Cost to the Government may be considered as an important factor in the least restrictive means analysis, however, in some circumstances

RFFA may require the Government to incur expenses or modify existing programs to accommodate citizens' religious beliefs. *Hobby Lobby*, S.Ct. at 2781.

In *Christie*, the 9th circuit held that the Government met its burden of proving that a complete mandate on the Ministry's use of cannabis was the least restrictive means to ensure that cannabis was not diverted to the general public. The record demonstrated that the Ministry had made little to no effort to restrict cannabis use and distribution to ministry members. In fact, the court noted, the Ministry's core beliefs were rooted in a "divine command to spread cannabis" and "distribute herb all over the world." *Christie*, 825 F. 3d. at 1063. Moreover, the Ministry used an express distribution process that made it easy for the public to quickly "join" the Ministry and obtain cannabis. *Id*. at 1057. Given this documented evidence on the record, the court rejected the Ministry's alternative means argument that they could undertake the sort of extensive reforms needed to mitigate diversion. *Id*. at 1063.

In *Hobby Lobby*, the Supreme Court held that in some cases RFRA protection may require the Government to expend additional funds and/or modify existing programs to accommodate citizens' religious beliefs. *Hobby Lobby*, S.Ct. at 2782. In this case, a for profit business objected to providing contraceptives to employees as required under the Affordable Care Act. The Court held that an existing exception for nonprofit religious organizations could be extended to a for profit businesses. *Id*. The Court reasoned that because the Government covered contraceptive costs for the employees of certain religious non-profits, it could likewise cover the costs of providing contraceptives to Hobby Lobby employees *Id.* at 2782. The Court held that this option presented a less restrictive of means of ensuring access to contraceptives than forcing Hobby Lobby to implement policies in opposition to the corporation's religious beliefs. *Id.* The Court concluded that protecting the religious freedoms of Hobby Lobby was worth the additional cost to the Government.

In *Gonzales*, the Supreme Court held that a complete mandate on a Sect's use of its sacramental tea was not the least restrictive means of ensuring that the Government could enforce the CSA. *Gonzales,* 126 S.Ct. at 1222. The Court relied on the longstanding existence of the peyote exemption for Native American tribes to assert that enforcement of the CSA is not automatically adversely affected by the grant

of an exception to a religious entity. *Id.* Because the peyote exception has been in place since the outset of the CSA, and there is no evidence that the exception has precluded the Government's ability to enforce a ban on peyote for non-Native Americans, the Court rejected the Government's argument that the CSA would be automatically undercut if not universally applied. *Id.* at 1223.

The facts of this case are distinct from *Christie* because the there is no concrete evidence linking the Church's use and cultivation of mushrooms with recreational use. Unlike in *Christie*, where the ministry encouraged widespread recreational use of cannabis, the Church's use of its sacrament is strictly limited to Church members during sacred rituals and religious ceremonies. Mission and Code of Conduct. 1, 2021. Although the Government alleges that some Church members are concerned about the spiritual seriousness of some recent attendees from outside the Mazatec community, there is no evidence to suggest that the Church makes efforts to recruit followers from outside of the close-knit Mazatec community. Rodriguez Dep. 6, 2021. Moreover, consumption of the mushrooms is strictly conducted under the watchful eye of the trained Shaman who takes precautions to protect the sacrament and guard it from outside intervention. Tiatoa Dep. 5-7, 2021. Unlike in *Christie* where it was obvious that alternative means were inconducive given the nature of the Ministry's past actions and beliefs, there is no evidence on the record to suggest that the Church's existing practices or beliefs in any way inhibit it from undertaking reforms to mitigate potential diversion.

The Government may argue that the granting an exception for the Church in this case will be costly as it may require an allocation of additional resources in the Williams community. As noted in *Hobby Lobby*, the Government may be required to disperse additional funds to accommodate a RFRA protected religious exemption. *Hobby Lobby*, S.Ct. at 2781. The Supreme Court holding in *Hobby Lobby* provides that where an alternative means exists, the Government has a duty to pursue it. In *Hobby Lobby*, accommodating a for profit company's right to exercise its religion was considered worth the cost, surely preserving the Mazatecs ancient use of its religious sacrament is of equal importance.

The Government may argue that to effectively enforce the CSA, it must prohibit the Church from cultivating and using psilocybin mushrooms to prevent diversion. This argument fails, because like the

Sect in *Gonzales*, the Church's use of a controlled substance does not by default have an adverse effect on the Government's ability to enforce the CSA. By way of acknowledging the success of the 35-year-old peyote exception for Native Americans, the Government has developed other means to restrict the use of controlled substance to an exempted religious group. For this reason alone, it is readily apparent that a complete mandate on the Church's use of its sacrament is not the least restrictive means to ensure the Government's effective enforcement of the CSA. The Government's compelling interest argument in this case is a rerun that has been previously dismissed by courts conducting RFRA analysis in cases with similar fact patterns. Moreover, the Government's push to issue a complete mandate on the Church's use of its sacrament is far from the least restrictive means of achieving its stated interest.

Applicant Details

First Name	**Daniel**
Middle Initial	**J.**
Last Name	**Heintz**
Citizenship Status	**U. S. Citizen**
Email Address	**d.heintz@wustl.edu**
Address	**Address** **Street** **76 Vernon Place** **City** **Mt. Vernon** **State/Territory** **New York** **Zip** **10552** **Country** **United States**
Contact Phone Number	**9176087805**

Applicant Education

BA/BS From	**Hamilton College**
Date of BA/BS	**May 2021**
JD/LLB From	**Washington University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014**
Date of JD/LLB	**May 15, 2024**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**Washington University Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Wiley Rutledge Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Drobak, John
drobak@wustl.edu
314-935-6487

Hollander-Blumoff, Rebecca
rhollander@wustl.edu
314-935-6043

Katz, Andrea
andrea.katz@wustl.edu

References

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Washington University
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andrea.katz@wustl.edu
(314) 935-4631

Professor Rebecca Hollander-Blumoff
Washington University
School of Law
rhollander@wustl.edu
(314) 935-6043

Professor John Drobak
Washington University
School of Law
drobak@wustl.edu
(314) 935-6587

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Daniel Heintz
76 Vernon Place
Mount Vernon, NY 10552
917-608-7805
d.heintz@wustl.edu

Date: July 1, 2023

The Honorable Stephanie Dawkins Davis
United States Court of Appeals for the Sixth Circuit
Federal Building and U.S Courthouse
600 Church Street, Room 125
Flint, MI 48502

Dear Judge Davis:

I am writing to apply for a clerkship in your chambers for a position beginning in 2024. I am a rising third-year law student at the Washington University School of Law, where I am the Online Content Editor for the *Washington University Law Review*.

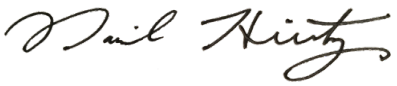
I am applying to your chambers for three distinct reasons. First, I want to learn the skills required to be a great litigator. I want to learn to write persuasively and craft an argument that is convincing and logically sound. Second, I enjoy the research and writing process. I want to learn about complex and novel legal issues, distill those issues, and express my findings clearly and effectively. And finally, I want to serve my community. The judicial system is often the only place where people come into direct contact with our constitutional design on a day-to-day basis. It provides a venue for people to vindicate rights, seek justice, and uphold the rule of law. I want to be a part of something that supports those noble objectives. I am committed to serving my country and community, and I will continue to do so throughout my legal career.

Any place where I can satisfy one of those would be a good place to work. But somewhere I can serve my country while working on cutting-edge, substantive and interesting legal problems presents an opportunity that is second to none. Clerking in your chambers is that opportunity, and it would be both an honor and a privilege to work alongside you and other members of your team.

Enclosed please find my resumé, law school transcript and two writing samples. The first writing sample is a draft appellate brief I completed during my work for the U.S. Attorney's Office for the Eastern District of New York. The second is an excerpt from a brief I submitted for the Wiley Rutledge Moot Court Competition at Washington University School of Law.

Please let me know if there is any other information that you would find helpful. Thank you for your time and consideration.

Sincerely,



Daniel J. Heintz

Daniel J. Heintz

Home Address: 76 Vernon Pl., Mount Vernon, NY 10552 | d.heintz@wustl.edu | 917-608-7805
School Address: 18 S. Kingshighway Blvd. Apt. 7V, St. Louis, MO 63108

EDUCATION

Washington University School of Law — St. Louis, MO
Juris Doctor Candidate — Expected Graduation: May 2024
GPA: 3.83 (Top 10%)

Honors & Activities:
- 2023 Honor Scholar (Top 10% in Academic Year)
- Dean's List (All Semesters)
- 2022 Wiley Rutledge Moot Court Octo-Finalist
- 2023 First Team All-MACHA (North)
- Scholar in Law Award (merit-based scholarship)
- *Law Review*, Online Content Editor
- WashU Club Hockey
- Criminal Law Society
- International Law Society
- Student Bar Association, *3L Rep.*

Hamilton College — Clinton, NY
Bachelor of Arts in Economics (with Honors) and Government — May 2021
GPA: 3.66

Honors & Activities:
- Soper Research Prize (Best Economics Thesis)
- Omicron Delta Epsilon (Economics Honor Society)
- Departmental Honors in Economics
- Dean's List (4 Semesters)
- Resident Advisor
- Club Hockey, *Captain*
- Athletics Public Address Announcer
- 88.7 WHCL-FM, *DJ and Host*
- Culinary Society, *Vice President*

Economics Thesis: "Lateral Damage: The Impact of Sanctions on Neighboring Countries' Trade Flows"
Government Thesis: "By Any Means Necessary: Determinants of Methods of Russian Foreign Activity"

EXPERIENCE

Cadwalader, Wickersham & Taft LLP — New York, NY
Summer Associate – Global Litigation (White Collar, Antitrust, Financial Services & IP) — May 2023–July 2023
- Produced memoranda and motions for proceedings in federal, state and administrative settings
- Analyzed issues relating to securities laws, the False Claims Act, the Sherman Act and MDL/class actions

The Hon. David W. Dugan, United States District Court for the Southern District of Illinois — East St. Louis, IL
Judicial Extern — January 2023–April 2023
- Drafted orders and memoranda for civil and criminal proceedings in federal court
- Researched issues relating to civil asset forfeiture, RICO and the Federal Rules of Evidence
- Observed criminal and civil proceedings, including motion hearings, trials, plea hearings and sentencings

U.S. Attorney's Office for the Eastern District of New York, Criminal Division — Brooklyn, NY
Legal Intern, Business & Securities Fraud/International Narcotics & Money Laundering — May 2022–August 2022
- Drafted motions, briefs and memoranda for investigations, trials and appeals
- Analyzed issues relating to securities fraud, FCPA and other federal criminal laws
- Participated in arraignment proceedings, pre-trial hearings, trials and proffer meetings

Hamilton College Department of Economics — Clinton, NY
Student Teaching Assistant — August 2020–May 2021
- Tutored students in all class years and courses during office hours and review sessions

City Court of Utica — Utica, NY
Undergraduate Judicial Intern — January 2020–March 2020
- Authored memoranda on judicial application of New York discovery and bail reform

Westchester County District Attorney's Office — White Plains, NY
Special Prosecutions Division Intern — June 2018–August 2018
- Researched evidentiary issues for attorneys, including the exclusion of alibi witness testimony
- Transcribed witness, victim, and defendant interviews for grand jury proceedings and trials

INTERESTS

Dogs, Star Trek, Pottery, Tyler Childers, The Rolling Stones, New York Yankees, New York Rangers, Golf

Daniel J. Heintz

School Address: 18 S. Kingshighway Blvd, Apt. 7V, St. Louis, MO 63108
Permanent Address: 76 Vernon Pl, Mount Vernon, NY 10552
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WASHINGTON UNIVERSITY SCHOOL OF LAW
Unofficial Grade Sheet

Spring Semester 2023 – Credits: **15.0 –** Semester GPA: **3.94** – Honors: ***Dean's List; Honor Scholar Award***
Cumulative GPA: **3.83 (Top 10%)**

Course Title	Instructor	Credit Hours	Grade
Administrative Law	Ron Levin	3.0	A+ (4.06)
Antitrust	John N. Drobak	3.0	A+ (4.06)
Securities Law Litigation and Arbitration	Jason Kempf	2.0	A- (3.58)
Pretrial Practice: Criminal	Christopher Hoell, Alexandria Burns	3.0	HP (3.94)
Judicial Clerkship Externship*	Mahrya Fulfer Page, Molly Snyder	3.0	CR (N/A)
Washington University Law Review*	Daniel Epps	1.0	CR (N/A)

*Credit/No Credit

Fall Semester 2022 – Credits: **15.0 –** Semester GPA: **3.95** – Honors: ***Dean's List***

Course Title	Instructor	Credit Hours	Grade
Corporations	Jens Frankenreiter	3.0	A (3.88)
Criminal Procedure: Investigation	Trevor Gardner	3.0	A (3.76)
Evidence	David Rosen	3.0	A+ (4.00)
Federal Courts	Rebecca Hollander-Blumoff	4.0	A+ (4.12)
Washington University Law Review*	Daniel Epps	1.0	CR (N/A)
Wiley Rutledge Moot Court Competition*	Jeff Drobish, Richard Finneran	1.0	CR (N/A)

*Credit/No Credit

Spring Semester 2022 – Credits: **16.0 –** Semester GPA: **3.77** – Honors: ***Dean's List***

Course Title	Instructor	Credit Hours	Grade
Legal Practice II: Advocacy	Jeff Drobish	2.0	A (3.76)
Constitutional Law	Andrea Katz	4.0	B+ (3.40)
Criminal Law	Elizabeth D. Katz	4.0	A (3.94)
Property	John N. Drobak	4.0	A (3.94)
Legal Research Methodologies II	Aris Woodham	1.0	HP (3.94)
Negotiation*	James Reeves	1.0	CR (N/A)

*Credit/No Credit

Fall Semester 2021 – Credits: **14.0 –** Semester GPA: **3.69** – Honors: ***Dean's List***

Course Title	Instructor	Credit Hours	Grade
Legal Practice I: Objective Analysis and Reasoning	Jeff Drobish	2.0	A (3.76)
Civil Procedure	Rebecca Hollander-Blumoff	4.0	A- (3.58)
Contracts	Scott Baker	4.0	A- (3.70)
Torts	Brian Z. Tamanaha	4.0	A (3.76)
Legal Research Methodologies I*	Aris Woodham	0.0	N/A

* Credit assigned to Spring Semester

Washington University in St. Louis

Office of the University Registrar

Record Of: **Heintz, Daniel J**
Student ID Number: 503459

Current Programs Of Study:
JURIS DOCTOR

Transcript Issued 06/09/2023 To:

RECIPIENT AS DESIGNATED BY STUDENT

Fall Semester 2021

LEGAL RESEARCH METHODOLOGIES I	LAW	W74 500D	0	CIP
LEGAL PRACTICE I: OBJECTIVE ANALYSIS AND REASONING (DROBISH)	LAW	W74 500U	2.0	A
CONTRACTS (BAKER)	LAW	W74 501H	4.0	A-
CIVIL PROCEDURE (HOLLANDER-BLUMOFF)	LAW	W74 506M	4.0	A-
TORTS (TAMANAHA)	LAW	W74 515D	4.0	A

Enrolled Units 14.0 Semester GPA 3.69 Cumulative Units 14.0 Cumulative GPA 3.69

Spring Semester 2022

LEGAL RESEARCH METHODOLOGIES II	LAW	W74 500E	1.0	HP
LEGAL PRACTICE II: ADVOCACY (DROBISH)	LAW	W74 500Z	2.0	A
CRIMINAL LAW (KATZ)	LAW	W74 502S	4.0	B+
NEGOTIATION (REEVES)	LAW	W74 503H	1.0	CR
PROPERTY (DROBAK)	LAW	W74 507D	4.0	A
CONSTITUTIONAL LAW (A. KATZ)	LAW	W74 520S	4.0	A

Enrolled Units 16.0 Semester GPA 3.77 Cumulative Units 30.0 Cumulative GPA 3.73

Fall Semester 2022

CORPORATIONS (FRANKENREITER)	LAW	W74 538W	3.0	A
CRIMINAL PROCEDURE: INVESTIGATION (GARDNER)	LAW	W74 542M	3.0	A
EVIDENCE (ROSEN)	LAW	W74 547K	3.0	A+
FEDERAL COURTS (HOLLANDER-BLUMOFF)	LAW	W74 634G	4.0	A+
MOOT COURT (WILEY RUTLEDGE MOOT COURT COMPETITION)	LAW	W75 604S	1.0	CR
LAW REVIEW	LAW	W77 600S	1.0	CR

Enrolled Units 15.0 Semester GPA 3.95 Cumulative Units 45.0 Cumulative GPA 3.80

Spring Semester 2023

ADMINISTRATIVE LAW (LEVIN)	LAW	W74 530A	3.0	A+
SECURITIES LAW LITIGATION AND ARBITRATION (KEMPF)	LAW	W74 568C	2.0	A-
ANTITRUST (DROBAK)	LAW	W74 611C	3.0	A+
JUDICIAL CLERKSHIP EXTERNSHIP	LAW	W74 654E	3.0	CR
PRETRIAL PRACTICE: CRIMINAL	LAW	W74 658Z	3.0	HP
LAW REVIEW	LAW	W77 600S	1.0	CR

Enrolled Units 15.0 Semester GPA 3.94 Cumulative Units 60.0 Cumulative GPA 3.83

Keri A. Disch, University Registrar

TO VERIFY: TRANSLUCENT GLOBE ICONS MUST BE VISIBLE WHEN HELD TOWARD A LIGHT SOURCE

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Washington University in St. Louis

Office of the University Registrar

Record Of: **Heintz, Daniel J**
Student ID Number: 503459

Spring Semester 2023

Distinctions, Prizes and Awards

FL2021 DEAN'S LIST
SP2022 DEAN'S LIST
FL2022 DEAN'S LIST
SP2023 DEAN'S LIST
SP2023 HONOR SCHOLAR AWARD

********** END OF TRANSCRIPT **********

Keri A. Disch, University Registrar

TO VERIFY: TRANSLUCENT GLOBE ICONS MUST BE VISIBLE WHEN HELD TOWARD A LIGHT SOURCE

Washington University in St. Louis
SCHOOL OF LAW

March 8, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

RE: Recommendation for Dan Heintz

Dear Judge Davis:

I am writing to support Dan Heintz's application to be your clerk. Dan is an outstanding law student and an enjoyable, well-rounded person. I know him well because he was a student in my first-year Property course in the Fall 2022 semester. He is currently a student in my Antitrust class.

In Property, Dan earned an A grade (3.94), which was the fifth highest grade in my class of 96 students. His answer to a question on the examination about estates in land and the Rule Against Perpetuities was truly outstanding. Dan's performance in the class discussions was just as good as his examination answers. He was always well-prepared and comfortable speaking in front of so many of his classmates. More relevant to a judicial clerkship, Dan earned a grade of A+ in Federal Courts, from one of our more experienced teachers.

Dan is a well-rounded person. You can tell that from his activities in college and his work experience. Dan is one of the best players on the Washington University club ice hockey team. He was captain of his ice hockey team at Hamilton College in New York, his undergraduate school. I can tell from Dan's interaction with his classmates that he is well-liked and viewed as a leader. Dan is friendly and easy-going. I have always enjoyed our conversations. From all his work experience with courts and with prosecutors' offices, I would expect that Dan is a team player who would fit in well in your chambers. Dan's long-term career goal is to work in a U.S. Attorney's office, so a clerkship with you would be an important step toward that goal.

I don't know if you aware of the outstanding quality of the law students at Washington University School of Law. In calculating its rankings, U.S. News uses a measure of the quality of a school's entering class that combines the students' LSAT scores and undergraduate grade point averages. Only five law schools outrank Washington University on that measure. Recently, an article in the ABA Journal noted that Washington University was the fourth "choosiest" law school in the country when it came to admitting an excellent first-year class. Dan's success in his courses among an excellent group of students at Washington University should make him competitive with the applicants you have from other prestigious schools.

I have no doubt that Dan will be an excellent clerk and that you will enjoy working with him. Consequently, I want to recommend him most highly to you.

Best,

/s/

John N. Drobak
George Alexander Madill Professor of Real Property & Equity Jurisprudence
Professor of Economics

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Washington University in St. Louis
SCHOOL OF LAW

March 13, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

RE: Recommendation for Dan Heintz

Dear Judge Davis:

I am delighted to recommend Dan Heintz for a clerkship in your chambers. Dan is one of the most appealing students I have ever taught. He is smart, funny, engaged, warm, and eager to learn and grow. He brings a positive energy to the classroom, and to every interaction, that is down-to-earth, genuine, and truly refreshing. He is also very talented, with a keen eye for critical details, a strong capacity for legal analysis, and excellent writing skills.

I've had the pleasure of teaching Dan in two classes. Dan was in my first-year Civil Procedure section in the Fall 2021 semester. I teach the class using the Socratic method, and also rely on volunteers. Dan sat, by choice, in the front row of my large section of 90 students. Dan was a very engaged class member, often volunteering an answer or offering an insightful question. Dan got a solid A- grade on our anonymously graded exam, demonstrating mastery of the material and a strong capacity to write well, analyze new facts, and apply doctrine correctly.

More recently, in Fall 2022, Dan was in my Federal Courts class, which, as you know, is one of the most difficult in the law school curriculum. We cover complex topics including justiciability doctrine, federal court jurisdiction and the scope of Congress's control thereof, non-Article III courts, sovereign immunity, and more. Dan earned an A+ in this class; he was in the top 4 students out of a class of 88. Again, Dan sat up front and was an integral part of classroom discussion – always extremely well prepared and ready with an answer to a cold-call question or a thoughtful inquiry of his own. Dan always brought a smile and a sense of humor to class, with a sunny attitude that brightened the whole room. His irrepressible spirit, in tandem with his very strong writing ability, fantastic analytical capacity, and complete mastery of our course doctrine, combined to make his performance truly a standout.

Given Dan's tremendous talent and his wonderful interpersonal skills, I know that he will be a fantastic law clerk. Were I to become a federal judge tomorrow, I would be thrilled to hire him as my clerk immediately. I recommend Dan to you without reservation.

Best,

/s/

Rebecca Hollander-Blumoff
Vice Dean for Research and Faculty Development
Professor of Law

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Washington University in St. Louis
SCHOOL OF LAW

February 22, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

RE: Recommendation for Dan Heintz

Dear Judge Davis:

I'm writing to recommend my student, Dan Heintz, for a clerkship in your chambers. Dan took Constitutional Law with me in the spring of 2022, earning an A in my course while also proving a delightful presence in the classroom. I give him my strongest recommendation.

Confident but grounded, quick-thinking and inquisitive, Dan was a standout in a first-year course of 45 students. One of a handful of students I felt comfortable flipping difficult questions to when others struggled, Dan, from the front row, would fluently respond to my questions or volunteer perceptive questions of his own. He showed a curiosity and poise that will serve him well in his future endeavors.

My introductory Con Law course covers a broad range of topics: the foundations of judicial review, standing and justiciability, Congress's powers, federalism, presidential power, and some of the highlights of rights jurisprudence, including due process and equal protection in race, sex, property, education, and voting. No student excels at all of these units: the budding tax attorneys tend to perk up at the Taxing & Spending Clause; the natural law-minded students at discussions of regulatory takings. Dan's preparation and level of engagement, however, remained impressively high over the whole semester. This was one of the qualities that stood out to me about him.

Then again, there were times where I recall Dan's class contributions with particular vividness. He was especially vocal about commerce clause jurisprudence and the Court's struggles to cope with a federal power whose scope has ballooned for reasons mostly external to the law itself. The same was true with regard to presidential removal: I remember Dan's take on *Seila Law v. CFPB*, which was to point out how the case manifested the tensions between Congress's pragmatism in devising administrative arrangements and the Supreme Court's separation-of-powers formalism. Dan's enthusiasm didn't flag when we got to civil rights, either; in his final exam he creatively and convincingly rewrote the famous *Griswold v. Connecticut* privacy decision.

Dan's success at WashULaw thus far speaks to the same energy and intellect he showed in my class. He received an A in my course, with a standout final exam in which he demonstrated clear prose and a mastery of the material. With a 3.80 GPA through two semesters of law school, Dan ranks in the Top 15% of his class—no mean feat considering that WashULaw students rank in the Top 5 of all U.S. law schools in median GPA and LSAT scores. I do feel that Dan could excel at any law school he were placed into.

Dan hopes to be a federal prosecutor, and at this early stage it seems he has availed himself of every opportunity to gain experience in the field. Not only did Dan achieve an A+ in Evidence and Federal Courts, two difficult courses with obvious utility to his chosen profession, but this spring he is also externing for the Hon. David Dugan (S.D. Illinois) in addition to his coursework. Dan has also interned at the U.S. Attorney's Office for the Eastern District of New York, and the Westchester County District Attorney's Office. This summer, he will hone his litigation skills as a summer associate at Cadwalader, Wickersham and Taft, LLP.

Last but not least, Dan would be a true pleasure to have in chambers. He is cheerful, likeable, hard-working, and easy to get along with. In short, Dan has the qualities that make a superb law clerk. I feel confident that you will enjoy working with him as much as I have.

Please feel free to call or e-mail me if I can offer any further information.

Best,

/s/

Andrea Katz

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Writing Sample

This writing sample is an excerpt from a brief which I prepared as a Legal Intern with the United States Attorney's Office for the Eastern District of New York, where I worked during the summer of 2022. The Office has given me permission to use this document as a sample of my writing. The brief was prepared for submission to the United States Court of Appeals for the Second Circuit as part of United States of America v. Boodie, Docket No. 21-2008 (2d Cir. Aug. 17, 2021). Certain information has been redacted to comply with confidentiality requirements. For the sake of brevity, the Preliminary Statement, Summary of Argument, and Conclusion are omitted. A copy of the writing sample in its entirety is available upon request.

This draft was submitted to the Office for review in July of 2022, and the finished brief was filed with the Second Circuit on September 6, 2022. I did not participate in any edits subsequent to the draft's submission in July of 2022. References to the Government Appendix are marked with an X. At the time this draft was submitted, the appendix had not yet been created, so references could not be created with page numbers.

The defendant in this case was sentenced to 360 months in prison for conspiracy to distribute or possess with the intent to distribute 50 grams or more of a substance containing cocaine base, in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A)(iii), Hobbs Act robbery, in violation of 18 U.S.C. § 1951, and conspiracy to commit murder-for-hire, in violation of 18 U.S.C. 1958. The brief argues that, in addition to the fact that the defendant is ineligible for sentence reduction pursuant to Section 404 of the First Step Act of 2018, the defendant failed to present any extraordinary or compelling circumstances justifying a sentence reduction pursuant to 18 U.S.C. § 3582(c)(1)(A) and the sentencing factors in 18 U.S.C § 3553(a) counsel against granting a sentence reduction.

STATEMENT OF FACTS

I. Overview of Boodie's Criminal Conduct

Prior to his arrest in 2002, Boodie was associated with a violent criminal enterprise known as the Cash Money Brothers, or "CMB." (See GA X).[1] As a CMB associate, Boodie purchased guns, sold drugs, facilitated the kidnapping of a rival drug dealer and conspired to commit murder, including murder for hire. (GA X).

Following his arrest, Boodie [redacted] on November 9, 2004, pleaded guilty to a three-count information [redacted] (GA X). Count One of the information charged Boodie with conspiracy to distribute or possess with the intent to distribute 50 grams or more of a substance containing cocaine base, in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A)(iii), Count Two charged him with Hobbs Act robbery, in violation of 18 U.S.C. § 1951, and Count Three charged him with conspiracy to commit murder-for-hire, in violation of 18 U.S.C. 1958. (GA X).

[redacted] Further, the government discovered that Boodie was involved in a plot to cover up threats against a prosecutor and witnesses in the prosecution of Bonanno crime family acting boss Vincent Basciano. (GA X). In addition, Boodie was involved in and disciplined for multiple incidents at the Metropolitan Detention Center ("MDC") from 2007 through 2013. (GA X). [redacted]

[1] Parenthetical references to "Br.," "Def. Mot." and "GA" are to Boodie's appellate brief, Boodie's July 2021 motion, and the Government's appendix, respectively. References to "PSR" are to the presentence investigation report prepared by Probation in connection with Boodie's sentencing in 2013.

II. Procedural History

Before his sentencing in 2013, the PSR described Boodie as a career criminal (GA X) and Probation recommended a statutory maximum sentence. (GA X). The principal issue at sentencing was whether to sentence Boodie to that maximum or to some lesser term. (GA X). Although the district court expressed doubt that any sentence below the statutory maximum could protect the public from Boodie, an incorrigible criminal (GA X), the court nonetheless sentenced Boodie to 360 months in prison, near the bottom of his Guidelines range. (GA X).

On June 20, 2019, Boodie filed a pro se motion for reduction in sentence pursuant to Section 404(c) of the First Step Act, Pub. L. No. 115-391, § 404(c), 132 Stat. at 5222. (GA X). Boodie argued that he was entitled to be resentenced because the mandatory minimum sentence for his narcotics trafficking conviction, ten years at the time of his guilty plea, had been reduced to five years by the Fair Sentencing Act of 2010, Public Law 111-220, 124 Stat. 2372. (GA X). The government opposed Boodie's motion on August 29, 2019, explaining that Boodie was ineligible for sentence reduction under the First Step Act because he had been sentenced in accordance with the Fair Sentencing Act. (GA X). The PSR stated Boodie was convicted of violating 21 U.S.C. § 841(b)(1)(B)(iii), and not § 841(b)(1)(A)(iii), in accordance with the Fair Sentencing Act amendments. (GA X). Further, the district court stated that the statutory maximum sentence was 40 years, also in accord with the revisions from the Fair Sentencing Act. (GA X).

The district court denied Boodie's motion on February 27, 2020. (GA X). Boodie appealed, and this Court affirmed by summary order on April 13, 2021, holding that Boodie was sentenced "in accordance with the Fair Sentencing Act" and is therefore "ineligible for a sentence reduction under the First Step Act." United States v. Boodie, 843 F. App'x. 415, 417 (2d Cir. 2021) (unpublished).

On June 1, 2021, Boodie submitted a request to the warden at USP Lee for compassionate release. (GA X). The warden denied the request on June 9, 2021. (GA X). On June 25, 2021, Boodie filed a motion for sentence reduction or compassionate release, pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), in the district court. (Def. Mot.). [redacted] Boodie argued that the nine-year delay in his sentencing, his conditions of confinement, and his rehabilitation were "extraordinary and compelling" reasons justifying his release. (Def. Mot.).

The government opposed Boodie's motion on July 27, 2021. (GA X). The government argued that Boodie had not presented any "extraordinary and compelling" circumstances justifying his release [redacted] his claims of rehabilitation and purportedly unconstitutional conditions of confinement were not "compelling and extraordinary" circumstances standing alone or together. (GA X). Alternatively, and in addition, the government explained that the Section 3553(a) sentencing factors did not weigh in favor of a reduction in Boodie's sentence; an issue Boodie's motion failed to address entirely. (GA X).

The district court denied Boodie's motion for compassionate release on July 29, 2021, holding that there are "no extraordinary or compelling reasons that permit the defendants release" and "the section 3553(a) factors do not support [Boodie's release]." (GA X). Boodie filed a Notice of Appeal with this Court on August 16, 2021.

ARGUMENT

I. Standard of Review

This Court reviews the determination of whether a defendant is eligible for a sentence reduction under the First Step Act de novo and the denial of a motion for reduction in sentence pursuant to 18 U.S.C. § 3582(c) for abuse of discretion. See United States v. Holloway, 956 F.3d

660, 664 (2d Cir. 2020); see also United States v. Brooker, 976 F.3d 228, 237 (2d Cir. 2020) (noting that discretion to decide compassionate release claims under § 3582(c)(1)(A) belongs to the courts). "[A] district court has abused its discretion if it has based a ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence, or has rendered a decision that cannot be located within the range of permissible decisions." United States v. Hasan, 586 F.3d 161, 168 (2d Cir. 2009) (quoting Sims v. Blot, 543 F.3d 117, 132 (2d Cir. 2008)) (internal emphasis and quotation marks omitted). "Mere disagreement with how the court balanced the § 3553(a) factors therefore is not a sufficient ground" for finding a district court abused its discretion. United States v. Halvon, 26 F.4th 566, 569 (2d Cir. 2022) (per curiam) (quoting United States v. Chambliss, 948 F.3d 691, 694 (5th Cir. 2020)) (internal quotation marks omitted).

II. Applicable Law

A district court may modify a sentence of imprisonment only in select circumstances. See 18 U.S.C. § 3582(b); see also Dillon v. United States, 560 U.S. 817, 824 (2010) ("[A] judgement of conviction that includes [a sentence of imprisonment] . . . may not be modified by a district court except in limited circumstances."). Section 3582(c) sets forth a few of these circumstances, including (1) where sentence modification is "expressly permitted by statute," 18 U.S.C. § 3582(c)(1)(B), and (2) where, after considering the factors from § 3553(a), a district court finds that "extraordinary or compelling circumstances warrant such a reduction." 18 U.S.C. § 3582(c)(1)(A).

A. The First Step Act

Section 3582(c)(1)(B) governs motions for sentence reduction pursuant to Section 404 of the First Step Act. See Holloway, 956 F.3d at 666.[2] In 2010, Congress passed the Fair Sentencing

[2] Boodie's suggestion that his motion should be governed by 18 U.S.C. § 3582(c)(2), see Br. 15, is incorrect. See Holloway, 956 F.3d at 666.

Act, which increased the threshold drug quantities applicable to certain drug offenses. See Pub. L. No. 11-220, § 2, 124 Stat. 2372 (2010). In 2018, Congress passed the First Step Act, which gave district courts the ability to reduce sentences for defendants who had been convicted and sentenced for "covered offenses" before the Fair Sentencing Act was enacted. See Pub. L. No. 115-391, § 404(a)-(b), 132 Stat. 5194, 5222.[3] The First Step Act expressly excepts defendants whose "sentences had been previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act." Id. at § 404(c).

B. Compassionate Release

Motions for compassionate release are governed by 18 U.S.C. § 3582(c)(1)(A). Brooker, 976 F.3d at 234. In evaluating motions brought pursuant to 18 U.S.C. § 3582(c)(1)(A), "a district court's discretion . . . is very broad." Id. (citing United States v. Cavera, 550 F.3d 180, 188 (2d Cir. 2008)). Thus, a district court has broad "discretion to consider whether any reasons [presented in a motion for compassionate release] are extraordinary or compelling." Brooker, 976 F.3d at 236 (noting that Application Note 1(D) of U.S.S.G. § 1B1.13 does not limit what circumstances the court may consider). Assuming "extraordinary and compelling" circumstances are present, district courts must also evaluate whether the factors listed in 18 U.S.C. § 3553(a) warrant a sentence reduction. 18 U.S.C. § 3582(c)(1)(A); see also United States v. Roney, 833 F. Appx. 850, 853 (2d Cir. 2020) (noting that even if a defendant presented extraordinary or compelling reasons for a reduced sentence, consideration of the Section 3553(a) factors is required before granting a motion for compassionate release).

[3] "[T]he term 'covered offense' means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372). Pub. L. No. 115-391, § 404(a), 132 Stat. 5194, 5222.

III. Discussion

A. Boodie Is Ineligible for a Sentence Reduction Under the First Step Act

1. This Court Ruled Previously that Boodie Is Ineligible for Sentence Reduction Under Section 404

This Court rejected Boodie's claim that he is eligible for sentence reduction pursuant to Section 404 of the First Step Act previously, and he is collaterally estopped from rearguing the issue. Under the doctrine of collateral estoppel, parties may not relitigate issues of fact or law that have been decided in previous proceedings. Wilder v. Thomas, 854 F.2d 605, 616 (2d Cir. 1988); United States v. Kramer, 289 F.2d 909, 913 (2d Cir. 1961) ("Collateral estoppel operates, following a final judgement, to establish conclusively a matter of fact or law for the purposes of a later [proceeding]."). Thus, "[u]nder collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue." Allen v. McCurry, 449 U.S. 90, 94 (1980) (citing Montana v. United States, 440 U.S. 147, 153 (1979)).

Collateral estoppel precludes Boodie from relitigating his eligibility for a sentence reduction under Section 404. This Court has ruled previously on Boodie's claim of eligibility, finding that he was ineligible for a sentence reduction under Section 404 of the First Step Act, and that decision was on the merits. Boodie, 843 F. App'x. at 416 (holding that because Boodie was sentenced "in accordance with the Fair Sentencing Act . . . he is ineligible for a sentence reduction under the First Step Act"). Accordingly, collateral estoppel bars Boodie from litigating his eligibility for relief under Section 404 of the First Step Act.

2. Boodie Waived His Section 404 Argument

The Court should also decline to consider Boodie's First Step Act argument because he failed to raise it below. Arguments raised for the first time on appeal will not be considered. See, e.g., Singleton v. Wolff, 428 U.S. 106, 120 (1976) ("[A] federal appellate court does not consider

an issue not passed upon below."). "The law in [the 2nd] Circuit is clear that where a party has shifted his position and advances arguments available but not pressed below, . . . waiver will bar raising the issue on appeal." Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 124 n.29 (2d Cir. 2005) (citing United States v. Schwartz, 535 F.2d 160, 163 (2d Cir. 1976). Courts may deviate from the general rule only in limited circumstances, such as when deviation is necessary to remedy obvious injustice. See, e.g., Thomas E. Hoar, Inc. v. Sara Lee Corp., 900 F.2d 522, 527 (2d Cir. 1990).

Boodie's appeal stems from a motion for sentence reduction pursuant to 18 U.S.C. § 3582(c)(1)(A), not Section 404 of the First Step Act. (Def. Mot.). [redacted] (Def. Mot.). He did not argue below that he is eligible for a sentence reduction pursuant to Section 404.[4] Accordingly, the Court should refuse to hear Boodie's First Step Act claim.

3. Boodie Was Sentenced in Accordance with the Fair Sentencing Act of 2010

On the merit's Boodie's First Step Act argument fails because he was, in fact, sentenced in according with the First Step Act already. Defendants like Boodie, who were convicted prior to the passage of the Fair Sentencing Act but sentenced after passage of the Act were sentenced under the guidelines as amended, and therefore received the benefit of the Act. See Dorsey v. United

[4] Even if Boodie had argued he was eligible for sentence reduction under Section 404 of the First Step Act, this Court's decision on this issue of law was law of the case in the district court proceeding. See United States v. Quintieri, 306 F.3d 1217, 1225 (2d Cir. 2002) ("The law of the case doctrine . . . requires a trial court to follow an appellate court's previous ruling on an issue of law in the same case.").

States, 567 U.S. 260, 281 (2012) (holding that the Fair Sentencing Act's lower mandatory minimums apply to "post-Act sentencing of pre-Act offenders"). Thus, in 2013 when Boodie was sentenced, "a sentence for conspiring to distribute 50 or more grams of cocaine base . . . was subject to only those penalties applicable to conspiracies involving 28 grams or more of crack cocaine." Boodie, 843 F. App'x. at 416. Section 404 of the First Step Act bars sentence reductions for defendants, like Boodie, whose "sentence[s] [were] previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010." First Step Act, Pub. L. No. 115-391, § 404(c), 132 Stat. 5194, 5222 (2018).

B. The District Court Considered Boodie's Motion for Compassionate Release and Did Not Abuse Its Discretion in Denying the Motion

1. Boodie Failed to Present Any Extraordinary and Compelling Reasons Justifying Compassionate Release

The district court did not abuse its discretion in determining that Boodie failed to present any extraordinary or compelling reasons warranting a sentence reduction. District courts have broad discretion in determining what constitutes an extraordinary and compelling reason. Brooker, 976 F.3d at 236. While this discretion is broad, "[r]ehabilitation . . . alone shall not be considered an extraordinary and compelling reason." Id. at 238 (citing 28 U.S.C. § 994(t)) (internal quotation marks and emphasis omitted). Further, for rehabilitation to qualify as extraordinary and compelling, it must be "so extraordinary as to not have been taken into account by the Sentencing Commission in formulating the Guidelines. United States v. Carpenter, 320 F.3d 334, 343 (2d Cir. 2003). Boodie presented his rehabilitation alone as an "extraordinary and compelling" circumstance, what Brooker forbids. Moreover, his rehabilitation was unremarkable and amounts only to taking advantage of generally available programs through the Bureau of Prisons.

[redacted] Similarly, Boodie's claim of confusion over the applicable guidelines at his sentencing hearing is not extraordinary and compelling, particularly because the claim lacks any merit.[5] See United States v. Henderson, 858 F. App'x 466, 469 (3d Cir. 2021) ("A previously rejected claim of sentencing error could never qualify as an extraordinary and compelling reason" (internal quotation marks omitted)). See also United States v. Mason, 692 F.3d 178, 184 (2d Cir. 2012) (citing United States v. Jass, 569 F.3d 47, 68 (2d Cir. 2009) ("Where we identify a procedural error in a sentence, but the record indicates clearly that the district court would have imposed the same sentence in any event, the error may be deemed harmless.").

2. The 3553(a) Factors Do Not Support Boodie's Release, and Boodie Abandoned Any Argument to the Contrary

Even if there were extraordinary and compelling reasons to release Boodie (there are none), the district court did not abuse its discretion in determining that the 18 U.S.C. § 3553(a) factors counseled against releasing Boodie. A sentencing judge is presumed to have considered every argument made by both parties absent evidence from the record indicating otherwise. United States v. Kimber, 777 F.3d 553, 565 (2d Cir. 2015). Even silence with respect to the reasons used by a district court does not necessitate a remand. See United States v. Christie, 736 F.3d 191, 196 (2d Cir. 2013). Rather, this Court "presume[s] that the judge properly considered" the § 3553(a) factors

[5] There is no evidence to suggest that the district court was confused about the applicable sentencing guidelines. In fact, the PSR stated Boodie was convicted of violating 21 U.S.C. § 841(b)(1)(B)(iii), and not § 841(b)(1)(A)(iii), in accordance with the Fair Sentencing Act amendments. (GA X). Further the district court stated that the statutory maximum sentence was 40 years, also in accord with the revisions from the Fair Sentencing Act. (GA X).

in the absence of contrary evidence. United States v. Young, 811 F.3d 592, 599 (2d Cir. 2016). See also United States v. Hilts, 696 F. App'x. 1, 5 (2d Cir. 2017) (noting that a district court, though not discussing each § 3553(a) factor at length, specifically mentioned it had considered each factor).

The district court ruled expressly that the § 3553(a) factors do not support Boodie's release, and there is no evidence to suggest the court failed to consider these factors. The Section 3553(a) factors weigh heavily against Boodie's release. The PSR described Boodie, who was convicted of the gravest of offenses, as "a career criminal." (GA X). The "nature and circumstances" surrounding Boodie's offense and the "seriousness of the offense" he plead guilty to, see 18 U.S.C. §§ 3553(a)(1), (2)(A), firmly support the district court's determination. Further, Boodie failed to provide any argument on the § 3553(a) factors, thus abandoning any claim that the factors favor his release. See, e.g., Molinari v. Bloomberg, 564 F.3d 587, 609 n.15 (2d Cir. 2009) (noting that a party's failure to raise an argument constitutes abandonment). Given his criminal history, the violent crimes for which he was convicted, and the need to "protect the public from further crimes committed by the defendant," id. at § 3553(a)(2)(C), the district court did not abuse its discretion in finding the Section 3553(a) factors counseled against a sentence reduction.

As the district court did not base its decision on an erroneous view of the law or a clearly erroneous view of the evidence the district court did not abuse its discretion in denying Boodie's motion for compassionate release.

Daniel Heintz

Writing Sample

This writing sample is an excerpt of a brief which I prepared for the 2022 Wiley Rutledge Moot Court Competition at Washington University School of Law. For the sake of brevity, I have eliminated the Cover Page, Factual Statement, Argument Summary, Conclusion, and all Front Matter. I have also eliminated Section II of the Argument, as that section was prepared by another individual. A copy of the writing sample in its entirety is available upon request.

This draft was submitted for the Wiley Rutledge Competition in the Fall of 2022. While I worked with a partner for the oral argument portion of the competition, this excerpt is my own work and was prepared without input, editing, or comments from any other individual. This work is entirely my own. Teams in the competition were assigned to either the Petitioner or the Respondent in a fictional Supreme Court case, and were tasked with drafting a brief in support of their assigned party and then, after submitting the brief, participating in oral argument. Participants were not allowed to choose which party their brief would be in support of.

The fictional case was developed out of the fact pattern presented in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022). In this case, the parent of a student brought suit challenging a prayer led by a high school football coach. The case was presented to the Supreme Court with two questions: (1) Whether the parent of a student who refuses to participate in a prayer led by an on-duty public school employee has standing, as next friend of her child, to assert a violation of the Establishment Clause; and (2) Whether it is a violation of the Establishment Clause for a public school district to permit an employee to lead a prayer among students participating in a school-sponsored activity. I prepared the sections of the brief responding to the first question.

ARGUMENT

I. PETITIONER LACKS ARTICLE III STANDING

Federal court jurisdiction extends only to "Cases" and "Controversies." U.S. Const., art. III, § 2, Cl. 1. To bring a claim in federal court, the party invoking federal jurisdiction must have standing. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021). To establish Article III standing, a plaintiff must show an injury-in-fact that is fairly traceable to the defendant's alleged illegal action and likely to be redressed by any judicial relief. *Id.* at 2203. To show an injury-in-fact, the plaintiff must demonstrate "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). While the alleged injury need not be tangible, *see Spokeo v. Robins*, 578 U.S. 330, 340 (2016), the injury must be judicially cognizable – that is, the injury must not be too abstract and "the dispute is traditionally thought to be capable of resolution through the judicial process." *Raines v. Byrd*, 521 U.S. 811, 819 (1997). The alleged injury must also be "fairly traceable to the conduct of the defendant, and not . . . the result of the independent action of a third party." *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41-42 (1976).

Parents do not have standing to assert that a policy violates the Establishment Clause when that policy neither proscribes nor prescribes religious activity by employees and students. The petitioner's theory, adopted by the courts below, is erroneous for multiple reasons. Such claims rely on the alleged violation alone to establish injury-in-fact. But the original understanding of the Establishment Clause demands that claims brought for an alleged violation be accompanied by allegations of concrete, personal injury beyond the mere violation itself. While some lower courts (including the courts below) have found standing for Establishment Clause claims based on direct contact with the alleged violation, those rulings are anomalous. This "offended observer" theory

of standing has never been recognized by this Court in any context, and is a judicially created outgrowth for Establishment Clause claims from this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which has since been abrogated. And even if this aberrant standing theory may apply to some Establishment Clause claims, challenges to a policy allowing, but not directing, optional employee-led prayer would still fail to demonstrate a judicially cognizable injury, as plaintiffs suffer no direct contact with the challenged conduct – that is, the policy itself. Claims based on these types of school district policies (i.e., policies that neither encourage nor discourage employee religious behavior) also fail to show the level of causation required by Article III standing. The alleged injury from any such policy necessarily requires independent actions by third parties not before the court. This Court has held repeatedly these types of tenuous causal links are insufficient.

A. Claims Challenging Neutral Policies Fail to Show Injury-in-Fact

Plaintiffs bringing Establishment Clause claims against a school district policy that neither encourages nor discourages participation in an optional religious display do not have Article III standing because such claims fail to show injury-in-fact. The nature of the Establishment Clause requires some actual, concrete injury to confer standing, a requirement that is unsatisfied by claims based purely on an alleged violation. Although some lower courts have fabricated standing for plaintiffs who allege direct contact with an Establishment Clause violation, this Court should overrule those precedents because they are anomalous and based on a flawed understanding of the Establishment Clause. And even if direct contact with an alleged violation could qualify as judicially cognizable injury for some plaintiffs, plaintiffs that challenge a policy similar to the District's can never satisfy injury-in-fact requirements, as there is no direct contact between the plaintiffs and the policy itself.

1. The Establishment Clause Demands More than an Alleged Violation

The nature of the Establishment Clause necessarily precludes standing for those plaintiffs that only claim an alleged violation. Unlike the Free Exercise Clause, the Establishment Clause is a structural protection that does not protect individual religious liberties. *See Elk Grove Unified Sch. Dist. v. Newdow*, 541 U.S. 1, 49-50 (2004) (Thomas, J., concurring). Rather, the Establishment Clause left the question of whether to establish a religion to the states. *Id.* at 49 (Thomas, J., concurring) (arguing that the Establishment Clause should not be incorporated against the states by the 14th Amendment). Although the Establishment Clause has been incorporated against the states, it remains a structural restriction on government. Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1, 32 (1998); *see also* Ashutosh Bhagwat, *Crossing Doctrines: Conflating Standing and the Merits under Establishment Clause*, 97 Wash. U. L. Rev. 1729, 1748 (2020) (noting the general consensus among legal scholars that the Establishment Clause is a structural provision). The Establishment Clause thus operates like any other structural provision in the Constitution: it limits the ability of governments (both federal and state) to make laws beyond the restrictions imposed by these structural provisions. The Establishment Clause does not, then, implicate individual rights merely based on an alleged violation. *See Allen v. Wright*, 468 U.S. 737, 754 (1984) ("[A]n asserted right to have the [g]overnment act in accordance with the law is not sufficient, standing alone, to confer jurisdiction on a federal court.").

Because the Establishment Clause is a structural provision, plaintiffs must show more than an alleged violation to satisfy the injury-in-fact requirement of Article III standing. Some violations of structural Constitutional provisions will provide an injury-in-fact sufficient to convey standing. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 935-36 (1983) (separation of powers); *Seila L.*

LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2195-96 (2020) (separation of powers); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536-37 (2012) (Commerce Clause, Taxing and Spending power). In fact, some alleged violations of the Establishment Clause may provide this injury. *See, e.g.*, *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 7-8 (1989) (taxation exemption for religious periodicals); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 224 n. 9 (1963) (school policy directing prayer); *Torcaso v. Watkins*, 367 U.S. 488, 489 (1961) (exclusion from government office). But, as with other structural Constitutional claims, mere violations of the Establishment Clause absent concrete personal injury do not satisfy Article III injury-in-fact requirements. *See, e.g.*, *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 485 (1982) (Establishment Clause); *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 209-10 (1974) (Incompatibility Clause); *United States v. Richardson*, 418 U.S. 166, 174-75 (1974) (Accounts Clause).

Challenges to a school policy that permits employees to offer voluntary prayer cannot show any injury but the alleged violation itself. Petitioner argues that the District's policy "subjected K.M. to the deprivation of his rights under the First and Fourteenth Amendments of the United States Constitution." R.3. But the Establishment Clause demands more than just the "psychological consequence" derived from the knowledge of an alleged violation, *Valley Forge*, 454 U.S. at 485, and claims challenging these types of passive policies do not allege any concrete injury. As these policies permit (but do not require) employees to engage in religious displays and do not require students to join in those activities, claimants against such policies fail to show any coercion from the policy itself, any deprivation of benefits, or any unequal treatment. Plaintiffs can only show offense at the alleged violation. Accordingly, such plaintiffs fail to show injury-in-fact and lack Article III standing.

2. Mere Offense is Not Injury

Mere offense at an alleged violation of the Establishment Clause is not judicially cognizable injury. Offended observer theories of standing have no basis in Article III standing jurisprudence and should be disregarded. This Court has rejected these arguments in every context, and there is no reason to alter this injury-in-fact requirement for Establishment Clause claims. And while some lower courts have fabricated "direct-contact" standing for Establishment Clause claims, these rulings are based on flawed and outdated Establishment Clauses analyses. Accordingly, this Court should deny this artificial standing theory and instead accord Establishment Clause standing with other standing doctrines, including those under the Free Exercise and Equal Protection Clauses.

Offense alone is not a judicially cognizable injury. "The presence of a disagreement . . . is insufficient by itself to meet Art. III's requirements." *Diamond v. Charles*, 476 U.S. 54, 62 (1986); *see also Allen v. Wright*, 468 U.S. 737, 755 (1984) (noting stigmatic injury alone, absent personal denial of equal treatment, does not confer injury-in-fact); *Harris v. McRae*, 448 U.S. 297, 321 n.24 (1980) (denying standing because plaintiffs "had not contended that the [statute] coerce[d] them as individuals"). In fact, this Court has already ruled that "offended observer" standing is invalid in Establishment Clause claims. *Valley Forge*, 454 U.S. at 485. In *Valley Forge*, the plaintiffs challenged the transfer of property as a violation of the Establishment Clause. *Id.* at 468. But this Court ruled that "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Article III." *Id.* at 485. Thus, plaintiffs cannot bring claims for mere offense at an alleged violation or for generalized grievances about government conduct. *See Schlesinger*, 418 U.S. at 217. That is all Petitioner alleges. While this Court has addressed some Establishment Clause claims without

discussing the issue of standing, *see, e.g.*, *Van Orden v. Perry*, 545 U.S. 677 (2005), the failure to discuss standing does not mean standing requirements are met. *Steel. Co. v. Citizens for Better Environment*, 523 U.S. 83, 91 (1998) ("[D]rive by jurisdictional rulings of this sort" have "no precedential effect.").

3. Offended Observer Standing is an Aberration

In contrast to this well-established rule, some lower courts (including the courts below) have fabricated standing for Establishment Clause claims. These courts, relying on *Schempp* and *Lemon*, decided the standing inquiry for Establishment Clause needed to be "tailored to reflect the kind of injuries Establishment Clause plaintiffs are likely to suffer." *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997). Tracing the analysis to *Schempp*, lower courts identified the fact that children in schools were "directly affected" by the challenged conduct, which justified "plac[ing] Establishment Clause cases in a separate category of standing concerns." *ACLU of Georgia v. Rabun Cty. Chamber of Commerce*, 698 F.2d 1098, 1102-03 (11th Cir. 1983); *see Suhre*, 131 F.3d at 1086 (citing *Schempp*, 374 U.S. at 224 n.9). And from *Lemon*, these lower courts identified the "government endorsement" test as the source of a modified injury-in-fact analysis for Establishment Clause claims. *Suhre*, 131 F.3d at 1086; *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017).

But this judicial creation is antithetical to Article III standing jurisprudence and is no longer valid. First, the *Lemon* endorsement test has been eliminated and no longer controls the analysis for Establishment Clause claims. *See Kennedy*, 142 S. Ct. at 2434 (Sotomayor, J., dissenting). In line with the true test for Establishment Clause claims, more than mere offense at challenged conduct is required to show injury-in-fact. *See Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 589 (2014) ("An establishment Clause violation is not made out" by "a person experience[ing] a

sense of affront from the expression of contrary religious views."). If the Establishment Clause does not allow "sense of affront" to invalidate certain religious action, there is no reason to extend standing artificially to plaintiffs who allege nothing but mere offense. With these aberrant theories now invalidated, this Court should instead accord standing doctrine under the Establishment Clause with that of other Constitutional claims.

* * * * *

Barring offended observer standing for Establishment Clause claims would accord Establishment Clause standing jurisprudence with this Court's standing doctrine in claims for alleged violations of the Equal Protection and Free Exercise Clauses. In contrast to the Establishment Clause, the Free Exercise and Equal Protection Clauses do act as individual protections. *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2099 (2019) (Gorsuch, J., concurring). But even these individual protections require more than mere offense at challenged conduct to constitute injury-in-fact. Both Clauses require more than an alleged disagreement with the challenged conduct to show personal, concrete injury.

In *Harris v. McRae*, this Court denied standing for claims brought under the Free Exercise Clause without concrete, personalized injury. 448 U.S. 297, 321 (1980). There, plaintiffs challenged a federal restriction on abortion funding, but the Court held "the plaintiffs had 'not contended that the [statute in question] in any way coerce[d] them *as individuals* in the practice of their religion.' " *Id.* at 321 n.24 (quoting *Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 249 (1968)) (emphasis in original). The injury plaintiffs allege must be personalized and concrete to them, not just disagreement with a government action. Allowing claims for offense alone under the Establishment Clause (a structural protection) conflicts with this standing under the Free Exercise Clause (an individual protection), which demands more than just offense.

So too in claims brough under the Equal Protection Clause. In *Allen v. Wright*, parents of African-American children sought to compel the Internal Revenue Service to deny tax-exempt status to discriminatory private schools. 468 U.S. at 754. But this Court ruled that the "stigmatic injury" the children allegedly suffered as a result of government support for racially discriminatory schools was not judicially cognizable, as standing extends "only to those persons who are personally denied equal treatment by the challenged discriminatory conduct." *Id.* at 755. Denying standing for children in *Allen v. Wright*, but allowing standing for identical injury in cases brought under the Establishment Clause leads to an absurd result, as noted by Justice Gorsuch in *American Legion*:

> An African-American offended by a Confederate flag atop a state capitol would lack standing to sue under the Equal Protection Clause, but an atheist who is offended by the cross on the same flag could sue under the Establishment Clause. Who really thinks that could be the law?

139 S. Ct. at 2099 (Gorsuch, J., concurring). Holding Establishment Clause claims to the same standard as Free Exercise and Equal Protection Clauses avoids these absurd results. Direct contact with an alleged violation, absent any claims of concrete and personalized injury, is insufficient to confer standing on any plaintiff. The Establishment Clause is no exception.

3. Petitioner Had No Direct Contact with the Alleged Violation

Even if the offended observer theory of standing were valid (it is not), Establishment Clause claims like petitioners fail to meet even this minimal standard because claimants do not show any direct contact with the policy. Plaintiffs in these cases allege injury suffered from the presence of a violation. But even the lower courts that allowed standing for plaintiffs based on offense alone required some direct contact with the challenged conduct itself. *See Suhre*, 131 F.3d at 1087-88. These rulings required plaintiffs to be "directly affronted by the presence of the allegedly offensive [violation]" to show injury-in-fact. *Saladin v. City of Milledgeville*, 812 F.2d

687, 692-93 (11th Cir. 1987). Although some courts require a showing of changing behavior to meet this "direct contact" theory of injury, *see e.g.*, *Freedom from Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1468 (7th Cir. 1988), the bare minimum requires at least "unwelcome direct contact with [the challenged conduct]." *Suhre*, 131 F.3d at 1086.

Even under this meager standard, plaintiffs challenging a policy that neither prohibits nor requires religious displays at school suffer no direct contact with the challenged conduct. These plaintiffs challenge the District policy. R.3. But they have no actual contact with the policy itself, only the actions of an independent third party. While other cases involving school prayer have found injury where students were subjected to a school prayer, those cases involved a school policy *directing* the religious exercise. *See Schempp*, 374 U.S. at 224 n.9; *Engel*, 370 U.S. at 425. For policies affirmatively directing employees to engage in religious activity, there would be no distinction between the school district and its agents. R.7. But the policy the petitioner challenges does not require religious exercise. R.5. In fact, the District's policy requires nothing at all. *Id.* As the employee conducting the religious exercise is not executing an affirmative requirement under school policy, the policy itself does not "directly affect" students. The only contact students have is with an independent third party or the letters received from the District representative. In both cases, petitioners do not come into direct contact with the challenged conduct: the policy itself. Even under this anomalous direct contact standard, then, plaintiffs challenging similar neutral policies do not even have direct contact with the challenged conduct, fail to demonstrate injury-in-fact, and lack Article III standing.

B. Petitioner Fails to Show Causation

Even if these claims could show judicially cognizable injury (they cannot), plaintiffs bringing claims challenging neutral policies also fail to show a direct causal link between the

challenged policy and any stigmatic injury allegedly suffered. In order to meet Article III standing requirements, plaintiffs must show "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. But a mere causal chain is not enough, as the claimed injury must be "fairly traceable to the challenged action of the *defendant*, and not . . . the *independent* action of some *third party* not before the court." *Simon*, 426 U.S. at 41-42 (emphasis added). This traceability requirement, like injury-in-fact, stems from Constitutional limitations. *See Wright*, 468 U.S. at 752 ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers."); *Id.* at 759 ("separation of powers that underlies standing doctrine explains [standing's traceability requirement].").

Any claimed injuries suffered by Petitioner or similar plaintiffs are not fairly traceable to the challenged school policy because such injuries necessarily require the independent action of third parties. Petitioner challenges the District's policy based on some claimed injuries suffered at the hands of Coach Kilmer, and the courts below found that because the District policy was responsible for the Coach Kilmer's prayer, the Petitioner's claims satisfied any causal requirements. R. at 6. But this is not a policy that includes the actions of independent third parties. In contrast to other Establishment Clause cases, the District's policy is neutral. *See Schempp*, 374 U.S. at 220 (policy affirmatively directing religious exercise by employees); *Engel*, 370 U.S. at 425 (policy requiring prayer at beginning of school day). Here, the nature of the District's policy precludes a finding that District employees were acting pursuant to a direction from the District. Instead, Coach Kilmer was acting on his own, without direction from the District. Relying on actions by third parties not acting pursuant to some affirmative District direction breaks the causal chain Petitioner seeks to establish.

Petitioner's only other claim of injury, that K.M. was made to feel like a religious outsider, *see Suhre*, 131 F.3d at 1086-87, is even more tenuously connected to the District's policy. As stated in Petitioner's complaint, K.M. suffered no negative consequences from Coach Kilmer for not participating. Instead, other students made one comment to K.M. about his non-participation. R. at 2. Notwithstanding the dubious assertion that these comments constitute judicially cognizable injury, *see Town of Greece*, 572 U.S. at 589 (noting that "a person experience[ing] a sense of affront from the expression of contrary religious views" is not enough to show a violation), this injury is even more attenuated from the challenged conduct. Here, the petitioner' claims rest not only on the independent action of the school employee choosing to engage in religious activity, but also on independent actors' responses to that religious activity. As this Court has asserted before, this line of reasoning is "attenuated at best." *Wright*, 468 U.S. at 757. The causal chain between the plaintiffs' alleged injuries and a neutral school policy is too attenuated to satisfy Article III traceability requirements. Accordingly, even if K.M.'s alleged stigmatic injury were judicially cognizable, such injury is not "fairly traceable" to the District's policy and Petitioner cannot satisfy the minim Article III standing requirements to invoke the jurisdiction of a federal court. Accordingly, this Court should reverse the judgement of the courts below and dismiss the Petitioner's claim for lack of standing.

Applicant Details

First Name	**Benjamin**
Last Name	**Horton**
Citizenship Status	**U. S. Citizen**
Email Address	**bhorton@jd21.law.harvard.edu**
Address	**Address** Street **9 Cranston Street** City **Boston** State/Territory **Massachusetts** Zip **02130** Country **United States**
Contact Phone Number	**585-730-2894**

Applicant Education

BA/BS From	**Skidmore College**
Date of BA/BS	**May 2012**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 27, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Law and Policy Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Minow, Martha
minow@law.harvard.edu
617-495-4276
Fein, Ronald
rfein@freespeechforpeople.org
617-244-0234
Tushnet, Rebecca
rtushnet@law.harvard.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

BENJAMIN HORTON
9 CRANSTON STREET, APT #1 BOSTON, MA 02130 • 585-730-2894 •
BHORTON@JD21.LAW.HARVARD.EDU

June 25, 2023
The Honorable Stephanie Dawkins Davis
United States Court of Appeals for the Sixth Circuit
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan 48226

Dear Judge Davis:

I am writing to express my interest in a clerkship in your chambers starting in 2024.

Before law school, I served in AmeriCorps in Boston Public Schools and worked in a number of roles: tutor, teacher, advisor. I concluded that, as a First-Generation college student, working in an access program at a college would be personally fulfilling and satisfy my interest in public service work. But while earning the requisite M.A., I took an education law course and was captivated. At the same time there was spike in speech issues on campus and I became fascinated by the tension between political equality and free expression. I pursued law school to investigate and help mitigate the tension between those ideals through a career in public interest law.

Much of my time at law school, from coursework to clinics to internships to independent research, focused on that goal, and I continued to work at the intersection of free expression and political equality during a one-year fellowship at Free Speech For People, a non-profit that litigates and advocates for free and fair elections. I worked on litigation involving Section Three of the Fourteenth Amendment, from research, to drafting complaints, to briefing before state and federal courts. I also supported anti-voter suppression litigation and campaign finance advocacy and supervised summer law school interns. This year I am clerking with Judge Hillman in the District Court of Massachusetts. I have secured a clerkship with a district court nominee for next year.

Ultimately, my goal is to become a clinical instructor and faculty member at a law school, specializing in election law and free expression issues, where I would be able to simultaneously practice, teach, and write. A circuit court clerkship would allow me to grow as a public interest lawyer and would be invaluable experience in deepening my legal research and writing skills.

Enclosed you will find my resume, law school transcript, and two writing samples. You will be receiving letters of recommendation from:

Prof. Martha Minow Harvard Law School minow@law.harvard.edu (617) 495-4276	Prof. Rebecca Tushnet Harvard Law School rtushnet@law.harvard.edu (617) 496-5899	Ron Fein, Legal Director Free Speech For People rfein@freespeechforpeople.org (617) 244-0234

I am happy to provide any additional information you may require. Thank you for your time and consideration.

Best,

Ben Horton

BENJAMIN HORTON

9 Cranston Street, Apt #1 Boston, MA 02130 • 585-730-2894 •
bhorton@jd21.law.harvard.edu

EDUCATION

HARVARD LAW SCHOOL, J.D., *Cum Laude* May 2021
Activities: *Harvard Law and Policy Review*, Online Editor
Democracy and the Rule of Law Clinic, Spring 2021
Supreme Judicial Court, Legal Intern, Fall 2020
Cyberlaw Clinic, Spring 2020

BOSTON COLLEGE, M.A., Higher Education Administration, *Magna Cum Laude* May 2018

SKIDMORE COLLEGE, B.A, English, Philosophy, *Summa Cum Laude*, with Honors May 2012

LEGAL EXPERIENCE

HON. TIMOTHY HILLMAN, DISTRICT OF MASS., Worcester, MA 2022-2023
Law Clerk

FREE SPEECH FOR PEOPLE, Newton, MA 2021-2022
Harvard Law School Public Service Venture Fund Law Fellow
Worked on litigation applying Section Three of the Fourteenth Amendment, including legal research, complaint drafting, and briefing before federal and state courts. Assisted managing interns, anti-voter suppression litigation, campaign finance litigation and advocacy, and public records requests.

CENTER FOR DEMOCRACY AND TECHNOLOGY, Washington, D.C. (remote) Summer 2020
Legal Fellow
Conducted legal and policy analysis of Section 230 reform efforts, drafted a report concerning online voter suppression, and drafted responses to the upcoming EU "Digital Services Act," wrote a blog post on Section 230 reform and co-wrote a guide on misinformation for election officials.

AMERICAN PROMISE, Cambridge, MA Summer 2019
Law Fellow
Provided legal research and analysis in support of a 28th Amendment to overturn *Buckley* and its progeny, including drafting amendment language and defending proposals from common criticisms.

PUBLICATIONS

An Issue of First Impression? State Constitutional Law and Judging the Qualifications of Candidates for the House and Senate, 102 NEB. L. REV. (2023) (forthcoming)

The Hydraulics of Intermediary Liability Regulation, 70 CLEVELAND STATE L. REV. 201 (2022)

January 6 shows why corporate political spending is bad for democracy, TRUTHOUT (Dec. 2021)

Online Voter Suppression: A Guide for Election Officials on How to Spot & Counter, CTR. FOR DEMOCRACY AND TECH. BLOG (October 16, 2020) (co-author)

EARN IT's State-law Exemption Would Create Bewildering Set of Conflicting Standards for Online Speech, CTR. FOR DEMOCRACY AND TECH. BLOG (August 11, 2020)

Online Censorship Is Unavoidable—So How Can We Improve It?, HARV. L. & POL'Y REV. BLOG (May 23, 2020)

OTHER

Before law school I worked as a faculty assistant at Boston College for three years and served in Americorps in Boston Public Schools for three years with City Year and Citizen Schools. During law school I volunteered with ACS's Constitution in the Classroom program. I am an Eagle Scout, and in my spare time I enjoy reading and writing fiction. I am admitted to the bar of Massachusetts.

Harvard Law School

Date of Issue: May 27, 2021
Not valid unless signed and sealed
Page 1 / 2

Record of: Benjamin Horton
Current Program Status: Graduated
Degree Received: Juris Doctor May 27, 2021 Cum Laude
Pro Bono Requirement Complete

JD Program

Fall 2018 Term: August 29 - December 20

1000	Civil Procedure 4 Cohen, I. Glenn	H	4
1001	Contracts 4 Frug, Gerald	P	4
1006	First Year Legal Research and Writing 4A Frampton, Thomas	P	2
1003	Legislation and Regulation 4 Tarullo, Daniel	H	4
1004	Property 4 Tushnet, Rebecca	H	4

Fall 2018 Total Credits: 18

Winter 2019 Term: January 07 - January 25

1054	Advocacy: The Courtroom and Beyond Gershengorn, Ara	CR	3

Winter 2019 Total Credits: 3

Spring 2019 Term: January 28 - May 17

2035	Constitutional Law: First Amendment Field, Martha	P	4
1002	Criminal Law 4 Kroger, John	P	4
1006	First Year Legal Research and Writing 4A Frampton, Thomas	P	2
1016	Human Rights and International Law Neuman, Gerald	H	4
1005	Torts 4 Sargentich, Lewis	P	4

Spring 2019 Total Credits: 18
Total 2018-2019 Credits: 39

Fall 2019 Term: August 27 - December 18

2034	Constitutional History I: From the Founding to the Civil War Klarman, Michael	H	3
2036	Constitutional Law: Separation of Powers, Federalism, and Fourteenth Amendment Minow, Martha	P	4
2897	Contemporary Issues in Constitutional Law Liu, Goodwin * Dean's Scholar Prize	H*	2
2030	Defending Constitutional Democracy Tribe, Laurence	H	2
2779	The Senate as a Legal Institution Feingold, Russell * Dean's Scholar Prize	H*	4

Fall 2019 Total Credits: 15

Winter 2020 Term: January 06 - January 24

2928	Election Law Stephanopoulos, Nicholas	H	3

Winter 2020 Total Credits: 3

Spring 2020 Term: January 27 - May 15

Due to the serious and unanticipated disruptions associated with the outbreak of the COVID19 health crisis, all spring 2020 HLS academic offerings were graded on a mandatory CR/F (Credit/Fail) basis.

2616	Advanced Constitutional Law: New Issues in Speech and Press Freedom Albert, Kendra	CR	1
2651	Civil Rights Litigation Michelman, Scott	CR	3
8004	Cyberlaw Clinic Bavitz, Christopher	CR	3
2674	Cyberlaw Clinic Seminar Bavitz, Christopher	CR	2
2086	Federal Courts and the Federal System Goldsmith, Jack	CR	4

Spring 2020 Total Credits: 13
Total 2019-2020 Credits: 31

Fall 2020 Term: September 01 - December 31

2042	Copyright Tushnet, Rebecca	H	4
3020	Freedom of Speech Frontiers: Comparative and Global Perspectives Minow, Martha	H	2
8099	Independent Clinical - Supreme Judicial Court of Massachusetts Fjeld, Jessica	CR	4
7000W	Independent Writing Minow, Martha	H	2

continued on next page

Harvard Law School

Record of: Benjamin Horton

Date of Issue: May 27, 2021
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2169	Legal Profession: Collaborative Law Hoffman, David	H	3
	Fall 2020 Total Credits:		15
	Winter 2021 Term: January 01 - January 22		
2507	State Constitutional Law Bowie, Nikolas	H	2
	Winter 2021 Total Credits:		2
	Spring 2021 Term: January 25 - May 14		
2753	Advertising Law Tushnet, Rebecca	R	3
8049	Democracy and the Rule of Law Clinic Nadeau, Genevieve	H	4
3063	Identity in American Literature of the 1940s Tarullo, Daniel	CR	1
7000W	Independent Writing Tushnet, Rebecca	H	2
2994	Legal Tools for Protecting Democracy and the Rule of Law in America Nadeau, Genevieve	H	2
2005	The Warren Court Klarman, Michael	H	2
3500	Writing Group: Intellectual Property Tushnet, Rebecca	CR	1
	Spring 2021 Total Credits:		15
	Total 2020-2021 Credits:		32
	Total JD Program Credits:		102

End of official record

HARVARD LAW SCHOOL
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Transcript questions should be referred to the Registrar.
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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program

Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)
Magna cum laude Next 10% of the total class following *summa* recipients
Cum laude Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates

LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

June 25, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

It is a genuine pleasure for me to write in support of Ben Horton who is applying to work as your law clerk. He has a tremendous work ethic; he is analytically sharp; and he has impressed me both in class and in an independent writing project.

As a student in my 100-person Constitutional law class, Ben was invariably prepared and alert to complexities and tensions in emerging doctrines. In addition to the usual class participation and final exam, I require each student to participate in an in-class moot court on a pending case, and to submit in advance written summaries of key arguments and after the class, written reflections on unexpected or challenging issues that came up in discussion. Ben's case involved a difficult Equal Protection challenge to voting districts. He ably dug into the record, showed not only real understanding but a valuable theory of the case, and offered perceptive reflections after the case. Although his final written exam fell just short of an honors grade, he left a strong impression of real talent from his work in the course. (I see from his transcript he has excelled in other classes).

I was pleased when he proposed an independent writing project after the course. I confess I learned more from his project (it will be a student Note) than he may have learned from me. He identified an intriguing piece of legislation, developed several lines of constitutional analysis to test whether it would and should survive challenge, and assesses the probable impact of the regulatory approach if enacted and successful in defeating constitutional challenges. The proposed federal statute would combat "social media addiction" with a range of regulations. Ben identified several that he argues are content-neutral and aim at introducing "friction" into the social media experience by banning such elements as "Infinite Scroll" (connecting the viewer to endless further posts); "Elimination of Natural Stopping Points," and "Autoplay." Impressively, he locates the bill in the context of a range of permitted and rejected regulatory efforts and in light of behavioral economics ideas about "nudging" the behavior of individuals; he shows how it pushes the boundaries of what is "deceptive" or "misleading" speech to include "manipulative" practices.

In the paper, Ben deftly mounted the frameworks provided from both commercial speech and core political speech doctrines. He made a convincing argument that the regulations could plausibly be characterized both as falling into the "uncovered" zone of commercial speech but also provided analyses should that argument fail to convince a court and trigger scrutiny under either a mid-tier or strict basis. Here, his paper makes more sense of the proliferating variety of "intermediate scrutiny" analyses than I have seen elsewhere while also making a strong case that strict scrutiny would not apply. After providing subtle comparisons of many opinions, the paper usefully notes: "To summarize, there is not a huge divide between the commercial speech cases and the content-neutral cases as to how the Court considers the evidence required to prove both the extent of the harm and the extent to which the statute furthers the government interests. In both cases, it is generally not sufficient to rely on a single study or on hearsay, but in certain cases in the content-neutral context the Court will allow "common sense" analyses. There is a large difference between the requirement of less burdensome alternatives." The paper also weighs the precedential value of content-neutral cases is uncertain in light of the passage of nearly 30 years since a clear application by the Supreme Court of the tailoring prong of intermediate scrutiny outside the commercial context and shifting membership of the Court and examines the law in light of more remote precedents. All told, it is a highly professional and shrewd analysis that has informed my understanding and thinking.

In our discussions about the paper, Ben responded with eagerness to comments and criticisms and revised the paper with alacrity. He also showed he has read and internalized material well beyond what he used in the paper. His conversation sparkles with ideas. It was therefore especially rewarding to hear his contributions this past fall in a seminar I co-taught on for others in freedom of expression law. The seminar drew on comparative responses to digital medial issues. Ben brought insights from his summer work at the Center for Democracy and Technology. There he worked on reform ideas for Section 230 of the Communication Decency Act, European Union approaches to liabilities of intermediaries like Facebook, Google, and other platform companies, and an online anti-voter suppression guide that was distributed to local election officials.

In addition to astute comments in class, Ben wrote one paper comparing the limited utility of international hate speech norms with U.S. treatments of speech in libraries, newspapers, and performance venues. He then wrote a longer paper recommending that regulators focus on the intrusive aspects of social media and target the subset of locations where misinformation develops and spreads. Talking with Ben about such issues is like talking with a colleague. He has developed sophistication and expertise; he is also continuing to probe and ask great questions as he works this spring with a nonprofit group and clinic called Protect Democracy. There, he is immersed in on anti-voter suppression litigation and is researching ways to revitalize local news. I conferred with the team on this second issue and once more, saw Ben engaging as a peer with the lawyers.

I have learned that Ben is the first in his family to go to college, and entered college off a wait-list. He went on to graduate summa cum laude, and clearly has enormous talent. He remains humble and unpretentious. He writes clearly and rapidly. He is also well-liked by other students. He has been deeply involved in our Cyblerlaw Clinic where he worked on a range of issues including surveillance and censorship laws in Ethiopia and investigating the effects of the USMCA on Canadian online platform liability. He worked at a campaign-finance non-profit that advocates for a constitutional amendment to overturn Supreme Court decisions rejecting campaign finance regulations, and got to have the really unique experience of essentially being an in-house academic. I very much appreciate Ben's self-awareness: he is not a free speech absolutist and has concerns about some current uses of the

Martha Minow - minow@law.harvard.edu - 617-495-4276

First Amendment while also caring very much about its fundamental values. He helped the nonprofit organization address current campaign regulation issues dealing with electioneering language, the Press Clause, and how the Court would use its existing campaign finance doctrine in a post-amendment world while also working on a possible constitutional amendment draft. This work fueled his course work and independent writing this year. This kind of focus shows initiative and drive. Longer term, he hopes to pursue work in consumer protection, privacy, and the First Amendment.

Ben has the maturity gained in three years working through AmeriCorps and also working as a faculty assistant at Boston College. He does not have resources from his family and has supported himself through school. He entered Harvard with a belief in meritocracy but awareness that life circumstances can lead to an underrepresentation of students coming from low-income families. I know that he admires his peers for their intelligence and hard work and genuinely appreciates the collaborative spirit of his classmates and alumni. His sense of appreciation, his tenacity, and his clarity are among his distinctive qualities. He is so thoughtful and analytic; he is also kind.

I am confident that Ben will be a truly outstanding clerk. I would hire him in a minute, and I recommend him highly.

Sincerely,

Martha Minow
300th Anniversary University Professor
Harvard Law School

Martha Minow - minow@law.harvard.edu - 617-495-4276

April 18, 2023

I am pleased to recommend Ben Horton, who worked under me as a Harvard Law School Public Service Venture Fund Fellow in his first year after law school, for a clerkship in your chambers. I believe he would be an outstanding clerk.

About the recommender
I direct the legal advocacy program at Free Speech For People, a national nonpartisan nonprofit public interest advocacy organization focused on cutting-edge impact litigation, policy development, and public education to uphold our constitutional democracy. Our national litigation docket is exclusively impact litigation, often undertaken in cooperation with an outside pro bono firm. I am intimately familiar with the responsibilities of a judicial clerk, as I clerked for the Honorable Douglas P. Woodlock in the District of Massachusetts (2003-04) and the Honorable Kermit V. Lipez on the First Circuit (2004-05).

Ben's role and work at Free Speech For People
As a Public Service Venture Fund Fellow, Ben worked as a staff attorney under my supervision. I would like to highlight two particular projects on which Ben has worked.

First, he evaluated a potential challenge to an aspect of an investigation launched by a committee of the Pennsylvania state senate into allegations of "fraud" in the 2020 election; the specific subject was a subpoena issued to state officials to turn over a voter file, including information not available to the public, for use by a private third-party contractor. Ben evaluated the viability of challenging this subpoena in federal court under Section 11(b) of the Voting Rights Act of 1965, 52 U.S.C. 10101(b), which prohibits intimidation of voters.[1]

[1] We have authorized his use of an edited excerpt of this memorandum as a writing sample.

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This project posed two distinct types of research challenges. First, there is very little judicial precedent under Section 11(b), and only three cases in its history (one of them won by our organization late in 2020) where equitable relief was awarded by the court. Second, as Ben came to discover, the case would be rife with non-merits complications, including standing, ripeness, state sovereign immunity, the similar but distinct federal common law doctrine of legislative immunity, arguments for abstention in favor of a pending state proceeding, and more. Furthermore, as Ben noted, these issues would play out differently depending on when we might file a complaint.

Evaluating the viability of this action required Ben to spot and anticipate a wide range of potential arguments in opposition to our proposed complaint. He did this independently and objectively, deftly addressing a broad range of federal jurisdiction complications that would beset the litigation even before we reached any merits issues under the Voting Rights Act. Furthermore, he did so with minimal hand-holding. (I confess that I had not even heard of the federal common law doctrine of legislative immunity until Ben raised it in our discussions.) Although we are an advocacy organization that is not afraid to tackle uphill or even "longshot" cases, Ben's professional and objective analysis of the obstacles that we would face persuaded us not to pursue it further based on the present facts.

Ben's second major project caught the attention of the New York Times and other media.[2] In late 2021, our organization began to explore applying state law candidacy challenge procedures to individuals who were involved in the events of January 6, 2021, on the basis of disqualification by Section Three of the Fourteenth Amendment. In the end, we filed three, and conducted the first trial under Section Three since Reconstruction.

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[2] *See, e.g.,* Neil Vigdor, *Effort to Remove Marjorie Taylor Greene From Ballot Can Proceed, Judge Says*, N.Y. Times, Apr. 18, 2022, https://nyti.ms/3u5pK2H; Jonathan Weisman, *Cawthorn Challenge Raises the Question: Who Is an 'Insurrectionist'?*, N.Y. Times, Jan. 25, 2022, https://nyti.ms/32GtTzV.

Embedded within this project were dozens of complex legal questions, most of first impression. To address these questions, Ben was required to draw creatively upon a wide range of legal research skills and materials. For example, to determine a usable meaning of "insurrection" under Section Three of the Fourteenth Amendment, Ben combined several modes of constitutional interpretation: original intent and original public meaning based on historical materials from the mid-19th century; post-ratification historical practice; and modern judicial precedent defining the term in other contexts. He also researched and analyzed a broad range of other first-impression questions both constitutional (e.g., whether the Qualifications Clause preempts state adjudication of congressional candidate eligibility) and procedural (e.g., regarding operation of particular state law candidacy challenge procedures). Besides his extensive legal memoranda, Ben took a substantial role in assembling facts for the first such challenge we filed, and wrote the first draft of the complaint; he also contributed critically to the legal briefs in both state and federal courts in all our cases.

While Ben worked on other projects as well during his time here, I highlight these two not only because of the amount of his time involved, but also because they demonstrate full-spectrum legal research, thinking, and writing. Collectively, these two projects demonstrate Ben's exceptional competence in everything from a scholarly analysis of primary materials from the 1860s, to "bread-and-butter" federal courts topics such as standing, ripeness, and sovereign immunity, to down-in-the-weeds factual analysis.

Impressions and recommendation

I believe Ben has several attributes that would make him an outstanding addition to your chambers.

First, he operates at the highest level of intellectual capability. He is undaunted by intellectually complex topics, and holds his own in conversations with our outside expert witness law professors. I often bounce my own ideas off him. No legal topic will be too difficult for him.

Second, while he does tend towards an intellectual bent, he is entirely comfortable with the types of jurisdictional, procedural, and other non-merits issues that often accompany litigation, as well as getting his hands dirty in a factual record.

Third, he works independently and with earned confidence. Early in his time with us, I assigned him to smaller projects (e.g., a Freedom of Information Act appeal) and checked every case citation to ensure that he was describing the case accurately. I also would, after receiving his draft, do my own research to make sure that he hadn't missed something else. I can confirm, based on experience, that it is not necessary to do this with Ben's work.

Of course, no one is perfect. When he first started at FSFP, Ben's writing style in memoranda was somewhat more academic than some might prefer; I worked with him on this and he substantially improved.

I believe that, if you choose Ben to serve in your chambers, he will quickly earn your confidence as someone who can be asked to evaluate a difficult motion or appeal, research the parties' arguments, recommend an outcome (if that is your request), and draft a high-quality bench memorandum or opinion. His legal research and writing skills, and his judgment, are superb. In terms of personal characteristics, he is a pleasure to work with in every way.

I would, of course, be happy to answer any questions you may have over the telephone.

Sincerely,

Ronald A. Fein
Legal Director, Free Speech For People
617-244-0234 / rfein@freespeechforpeople.org

June 25, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am writing in support of the application of Ben Horton for a clerkship.

Ben was a student in my Fall 2018 Property, Fall 2020 Copyright, and Spring 2021 Advertising Law classes, as well as in a Spring 2021 writing group that allowed students to produce legal scholarship. He earned an Honors in Property, Copyright, and the writing group, and although he is recorded as having a Pass in Advertising Law, my records indicate that this is an error: he should have had an Honors as well. I take full responsibility for not catching and correcting this earlier, but it's strong evidence that his upwards trajectory during law school was unbroken.

The best evidence of Ben's abilities to do sustained legal analysis come from his writing group project, published as *The Hydraulics of Intermediary Liability Regulation*, 70 Clev. St. L. Rev. 201 (2022). The article starts with an important fact that many would-be internet regulators have simply not grasped: Most content moderation currently focuses on "lawful but awful" speech—speech that is not illegal, but is harassing, hateful, overly sexual for its context, etc. Platforms prioritize moderating awful speech because users and advertisers generally prefer that. The article then explains how that fact interacts with the legal liability regime: Platforms can prioritize moderating awful speech because they are not liable for unlawful content posted by users. Without the protections of Section 230 of the Communications Decency Act, platforms would instead have to prioritize *allegedly* unlawful speech—e.g., speech that someone alleged was defamatory. They would risk liability if they failed to remove such speech. But negative factual claims about a person, if not defamatory, can be extremely important for political, cultural, and social discourse. So a change in the liability regime would shift platform resources from moderating awful speech to moderating potentially unlawful speech, which would probably make the overall environment worse for most users even if platforms were good at distinguishing defamation from nondefamatory negative speech, which they are not. Ben's article is a well-argued piece that unites doctrine with realism, resulting in an insight that has eluded many who are making legal arguments about platform regulation.

My experience with Ben's work in his exam classes was also highly positive. Because I ask students to complete multiple assignments over the course of the semester, I got a chance to evaluate Ben's legal writing under different time and word limit constraints. Among other things, in Property, he scored a 9 out of 10 on an assignment focusing on estates in land and future interest, a high score that demonstrates a strong ability to apply a complicated set of rules to specific facts. He also did a good job applying Carol Rose's theories about property to a dispute about the ownership of a valuable home run ball hit by Barry Bonds, and analyzing a proposed statute to reduce racial wealth gaps. He also did well on the exam, which was an 8-hour take-home.

Likewise, in Copyright, his class and course website participation showed that he readily grasped the key doctrines. On the midterm exercise, he was able to work his way through difficult questions about duration and termination of transfers—highly complex statutory provisions that resemble the tax code more than the rest of copyright. He also understood the doctrines that involved more judgment calls. For an assignment to discuss an arguable fair use, for example, he identified a T-shirt with a depiction of a Pokemon on it, juxtaposed with the word "lettuce," and persuasively analyzed whether the somewhat bizarre juxtaposition would qualify as fair use under existing doctrine.

In Advertising Law, Ben was also a strong participant. Advertising Law is a bit unusual in that it is something of a capstone/survey course: We review a number of legal doctrines at a brisk pace so that students can get an idea of just how much a lawyer doing advertising review needs to consider, as well as doing a very deep dive on false advertising specifically. Ben was strong across the board. On the midterm, for example, he performed an excellent analysis of whether Grubhub was falsely advertising when it hosted restaurant menus on its site, but then suggested that they were closed if they didn't have relationships with Grubhub. On the exam, when asked about the difference between falsity-based and non-falsity-based doctrines and their intersection with commercial speech, he made the insightful point that even doctrines that initially look like they're indifferent to the commercial status of the speech regularly have some element or factor that weighs commerciality against a defendant. Thus, commercial speech exceptionalism is at work even when it doesn't seem to be.

Ben's strengths in Advertising Law match his experience interning on the Massachusetts Supreme Judicial Court, where the variety of cases offered him many different legal and factual situations; I understand that he enjoyed the opportunity to work with a generalist court because each case was potentially a new field. At Free Speech For People, he's also had the opportunity to follow cases from start to finish, which allows him a broader perspective on how litigation works.

I enjoyed having Ben in my classes, and he was a strong supporter of others' work in the writing group, offering genuinely constructive feedback. Given my experience with Ben's written work, as well as his class participation and assistance to others during the writing group, I believe he would be well positioned to succeed in a clerkship and as a lawyer.

I'd be happy to discuss Ben further either by email (rtushnet@law.harvard.edu) or phone (1-703-593-6759).

Yours sincerely,

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BENJAMIN HORTON

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The writing sample below is a bench memo written prior to a hearing on a motion to dismiss. It is shared with the permission of Judge Hillman. It has not been edited by anyone other than myself and contains the entirety of the memo. The memo addresses the various jurisdictional defenses the United States has raised as well as a timeliness issue with some of the claims and a motion to transfer.

WRITING SAMPLE

To: TSH
From: Ben Horton
Date:11/18/2022
Re: K.O. et al 20-12015 – Motion to Dismiss

The defendant only moves to dismiss on the basis of subject matter jurisdiction, not a failure to state a claim. Its jurisdictional arguments rest on various exceptions to the waiver of immunity by the FTCA. It also makes a motion to transfer. Although this is a class action, the defendant also does not address any issues with class certification in its motion.

I. Background

Because the defendant does not contest the tort claims directly, I only discuss the facts insofar as they are relevant to immunity and transfer.

A. *Flores* and Immigration Law

In 1997 the United States entered a settlement agreement ("*Flores* settlement") concerning the treatment of noncitizen children. (Am. Comp. at ¶ 27). That agreement sets the rules for detaining noncitizen minors, including policies encouraging immigration authorities to release minors whenever possible and to place minors in the "least restrictive setting." (*Id.* at ¶¶ 28-31). Although the *Flores* settlement was intended as a stopgap measure, and there are some statutes concerning the detention of minor noncitizens passed after *Flores*, both parties agree the agreement is still in effect. *See Bunikyte v. Chertoff*, No. 07-164, 2007 WL 1074070, at *2-*3 (W.D. Tex. Apr. 9, 2007).

In 2008 Congress passed the Trafficking Victims Prevention and Reform Act ("TVPRA"). P.L. 110-457, Title II, § 235 (Dec. 23, 2008). Under that act, an "Unaccompanied alien child" ("UAC") is a child under 18 with no lawful immigration status and no parent or legal guardian available to care for them in the United States. Under that statute, "[e]xcept in the case of exceptional circumstances," minor noncitizens can only be detained for more than 72 hours before being transferred to the custody of Health and Human Services (here, the Office of Refugee Resettlement, "ORR").

B. The policy

The plaintiffs allege that, beginning in 2017, the Trump administration instituted a policy of separating families at the border in a stark break from previous policy. (Am. Comp. at ¶¶ 36-43). The policy began in earnest in late 2017 and was undertaken as a general policy regardless of the factual circumstances of the family in question. (*Id.* at ¶¶ 47-48). During separation, parents were not allowed to speak with their children. (*Id.* at ¶ 58). The conditions at the detention centers children were kept in was subpar, to put it mildly. (*Id.* at ¶¶ 59-61). Reunification was complicated by the decision to label the children as "unaccompanied," (*id.* at ¶ 64).

The policy was escalated in April 2018 when the Trump administration announced a "zero tolerance policy" for illegal border crossings where all noncitizens would be detained and

referred for prosecution. (*Id.* at ¶¶ 68-70). However, plaintiffs allege the policy was a smokescreen for a policy of separation that occurred both before and after the "zero tolerance" announcement and occurred even when there was no prosecution. (*Id.* at ¶¶ 71-79).

Plaintiffs argue that this policy was motivated by animus toward noncitizens and immigration generally, pointing to public remarks by senior Trump administration officials. (*Id.* at ¶¶ 80-101). Plaintiffs argue that defendant was aware of the trauma that children would suffer but failed to provide adequate mental health care. (*Id.* at ¶¶ 102-18). They also argue that many parents were forced to waive their rights to apply for asylum in return for reunification. (*Id.* at ¶¶ 119-23)

C. K.O, E.O., L.J., E.O., Jr.

This family ("Family O") resides in Westborough, Massachusetts. (*Id.* at ¶ 12). They are seeking asylum and fleeing violence and persecution in Guatemala. (*Id.*). K.O. is a minor and E.O., Jr. was a minor when the complaint was filed. (*Id.* at ¶ 10). L.J. is the mother and E.O. is the father. E.O. was already living in Massachusetts when his family crossed the border. (*Id.* at ¶ 143).

On May 19, 2018, Family O, with the exception of E.O., arrived in Texas. (*Id.* at ¶ 127). They arrived in the Southern District of Texas. (Docket No. 61, at 4 n. 4).[1] After being apprehended by a Customs and Border Protection Agent ("CBP"), they were brought to a border detention agency. (Am. Comp. at ¶¶ 130-32). Both the children were taken from their mother, and questioned. (*Id.* at ¶¶ 133-35). K.O., the younger child, was brought back to her mother and they were kept in a cell for 12-14 hours. (*Id.* at ¶¶ 136-38). At that point, K.O. was forcibly separated from her mother. (*Id.* at ¶¶ 138-41). L.J. was never charged with a crime, nor was there allegation of abuse or neglect. (*Id.* at ¶ 145).

The day the children were separated, a CBP or Immigration and Customs Enforcement ("ICE") officer called E.O., the father, and told him his children were in custody, separate from their mother, and would be placed in the custody of a social worker. (*Id.* at ¶ 144).

On May 20, 2018, E.O. received a Family Reunification Application and began the process of trying to reunite with his family; the process dragged on due to interviews and errors in the documentation. (*Id.* at ¶¶ 164-65). As a condition of receiving custody of his children E.O. had to attend a presentation directed toward guardians of unaccompanied minors. (*Id.* at ¶ 166).

The children of Family O were reunited (though not allowed to speak to each other) and brought to a different facility in separated cells that faced each other. (*Id.* at ¶ 146). They spent two days in the facility where they were not allowed to speak and only had access to thermal blankets. (*Id.* at ¶¶ 147-49). The children in the facility were not taken care of, there was no support for children as young as two or three, the guards verbally abused the children when they cried, and one guard kicked E.O., Jr. (*Id.* at ¶¶ 150-53).

After two days, the children were taken to another facility, then to Michigan; on the way, CBP or ICE agents told E.O., Jr. his mother had been deported. (*Id.* at ¶¶ 156-57). The children were

[1] The plaintiffs represent that Family O crossed near "McAllen, Texas" in their complaint; the briefing clarifies, correctly, that is in the Southern District of Texas.

separated; K.O. was brought to a foster family with three other children who had been separated and spoke with her father every night. (*Id.* at ¶¶ 158-59). E.O., Jr. was in a facility with eighteen other boys and attended school in the morning where he could see K.O. (*Id.* at ¶ 160). During this period the children were vaccinated, despite already being vaccinated, and not told where their mother was. (*Id.* at ¶ 161-62).

The children were reunited with their father on June 19, 2018, having flown from Michigan, to D.C., to Boston. (*Id.* at ¶ 166).

During this time L.J. remained detained in Texas and was not able to call her husband for nine days. (*Id.* at ¶168). After being found to have a credible fear of prosecution, (*Id.* at ¶ 169), L.J. was released on June 26, 2018 and reunited with her family shortly thereafter, (*Id.* at ¶ 170).

Due to the ordeal, the entire family suffers from trauma, especially the children. (*Id.* at ¶¶ 171-72).

D. C.J. and F.C.

This family ("Family C") resides in Westborough, Massachusetts. (*Id.* at ¶ 12). They are seeking asylum and fleeing violence and persecution in Guatemala. (*Id.*). F.C. is C.J.'s father.

Family C entered Texas on June 17, 2018. (*Id.* at ¶ 174). They entered the Western District of Texas. (Docket No. 67, at 4). They were quickly apprehended by CBP, detained, and told they would be separated. (Am. Comp. at ¶¶ 175-76). While detained, they were given an aluminum blanket to share and were cold and hungry. (*Id.* at ¶ 177-78).

On June 20, 2018, CBP agents told F.C. he had to leave his son in the facility while he attended court for the day and did not make it clear they were being separated. (*Id.* at ¶ 179). Instead, F.C. was held in an unidentified facility, possibly a prison or jail, then moved to another facility. (*Id.* at ¶ 181-85). F.C. spent three weeks with pending criminal charges before they were dismissed and was then moved to various immigration detention facilities. (*Id.* at ¶ 185). After several weeks an employee allowed him to use a phone and contact his son. ((*Id.* at ¶¶ 185-86). While his father was detained, C.J. was kept in a facility with other children separated from their families. (*Id.* at ¶¶ 189-91). They were reunited at an immigration detention facility on July 26, 2018. (*Id.* at ¶ 192).

Both father and son are traumatized by the ordeal. (*Id.* at ¶¶ 192-96).

The plaintiffs bring claims of IIED, NIED, False Imprisonment, False Arrest, Assault and Battery, Negligent Supervision, Tortious Interference with the Parent-Child Relationship, and Loss of Consortium.

II. Preliminary Issues

A. Motion to transfer to the Western District of Texas

Defendant argues for a transfer to the Western District of Texas, arguing it would be more convenient to the government officers likely to be witnesses, it would be consolidated with pending cases (which were filed later), and that Texas has an interest in Texas tort law concerning torts committed within Texas being decided by local federal courts. Plaintiffs argue one of the families never entered the Western District of Texas, there is a strong presumption of honoring the plaintiff's choice of forum, there will likely be witnesses from Michigan and D.C., and Massachusetts has an interest because its citizens were injured, and consolidation is not an issue because they filed in Massachusetts first.

The biggest problem with the defendant's motion to transfer is that you could only transfer one of the families. Family O crossed the border in the Southern District of Texas and there is nothing in the complaint that suggests she was detained in the Western District of Texas (though she might have been). Under 28 U.S.C. § 1402(b), a plaintiff can only bring a claim against the United States "in the judicial district where the claimant resides or where the act or omission occurred." Thus, even if you found a transfer was justified as to Family C, you would have to bifurcate the case which destroys any interest in judicial economy that might have been served.

Also, it is important that this is an FTCA case. The FTCA allows suits to be brought either in the judicial district where the tort occurred *or* the judicial district where the plaintiff resides. This seems to reflect a policy choice that plaintiffs injured while visiting another part of the country would not have to incur significant inconvenience to utilize the FTCA. But under defendant's interpretation, almost any FTCA case brought in the plaintiff's home district would be subject to a venue transfer, undermining this policy choice. Confirming this, there are very few FTCA cases where the United States has attempted to transfer venue. Also, there have been family separation cases litigated in non-border states or districts. Given these issues, I am not sure it is even necessary to do the balancing. But going through those factors, it still favors the plaintiffs.

In the District of Massachusetts, courts generally consider a six-factor test:

(1) the plaintiff's choice of forum, (2) the relative convenience of the parties, (3) the convenience of the witnesses and location of documents,[2] (4) any connection between the forum and the issues, (5) the law to be applied and (6) the state or public interests at stake. The burden of proof is on the party seeking the transfer. *Coady v. Ashcraft & Gerel*, 223 F.3d 1, 11 (1st Cir. 2000).

(1) The plaintiff's choice of the forum is given a strong presumption unless the plaintiff is not a resident, *First State Ins. Co. v. XTRA Corp.*, 583 F. Supp. 3d 313, 318-19 (D. Mass. 2022), the operative facts did not occur in the state, *Wadhams v. American Federation of Teachers*, No. 19-cv-12098-LTS, 2020 WL 3129480, at *3 (D. Mass. June 12, 2020), and possibly if the action is a class action, *In re Warrick*, 70 F.3d 736, 741 n.7 (2d Cir. 1995). The plaintiff is a resident and, for the reasons above, I do not think the fact that the operative facts occurred out-of-state should weigh heavily in an FTCA case. But this is a nationwide class action. I think this is a wash or goes toward plaintiff.

[2] Ease of access to documents is not normally considered in the digital age. *ViaTech Techs., Inc. v. Adobe Inc.*, No. 19-cv-11177-ADB, 2020 WL 1235470, *4 (D. Mass. Mar. 13, 2020).

(2) The relative convenience of the parties goes strongly to the plaintiffs. The defendant does not contend the plaintiffs would find Texas convenient. And the defendant is the United States—it cannot claim it cannot defend itself in the United States. The inconvenience of federal agents should be considered in the witness analysis.

(3) The relative convenience of the witnesses is a close call. This is often the most important factor. *First State*, 583 F. Supp. 3d at 319. But it primarily concerns witnesses who will need to be compelled. *Mateo v. Univ. Sys. of New Hampshire*, No. 18-cv-11953-FDS, 2019 WL 199890 (D. Mass. Jan. 14, 2019). Neither side has identified witnesses, though this is not a barrier to the court making an educated guess as to which state is more convenient. *First State*, 583 F. Supp. 3d at 319.

The witnesses will include federal personnel from Texas, Michigan, and possibly D.C. Insofar as they are employees, and can be compelled to come to Massachusetts by their employer, this is a wash. *Rosenthal v. Unum Grp.*, No. 17- 40064-TSH, 2018 WL 1250483 (D. Mass. Mar. 12, 2018) (finding that employees can be transported). And although the Texas agents would find Texas more convenient, there will likely be agents in Michigan and D.C. for whom Massachusetts may be (slightly) more convenient. Furthermore, witnesses might include other non-citizens, who could conceivably be in any state in the country. I think this factor is a wash, or slightly in favor of defendant.

(4 and 5) The connection between the forum and the issues goes to the defendant, insofar as most events occurred in Texas and Texas law will likely be the focus (though Michigan and maybe D.C. law will also be relevant). However, this was not a local issue. *Cf. U.S. ex rel. Ondis v. City of Woonsocket*, 480 F. Supp. 2d 434 (D. Mass. 2007) (a case concerning purely Rhode Island issues). These were federal agents implementing a federal policy. And this court is competent to apply any state's law. I find this factor only slightly weighs in favor of the defendant.

(6) The public interests do not favor transfer. Neither party has presented the court with any information about relative court congestion or similar issues. But more importantly, the most you could do at this point is bifurcate the case—which would *duplicate* the cases being litigated, which is the opposite of what transferring is intended to do. For this reason, none of the defendant's consolidation arguments hold water. This goes strongly toward the plaintiffs.

In sum, one factor is a wash or goes slightly toward plaintiffs, three go barely toward the defendant, and two go strongly for the plaintiffs. I recommend denying the motion to transfer.

B. Timeliness

The defendant argues that the claims brought by the parents in their individual capacity are time-barred. (Am. Comp. at ¶¶ 16-17). The parents added those individual claims in 2021, well after they filed their initial complaint and the United States had rejected settlement. There is no real substantive difference between the parents and the children's claims, though the parent/child distinction is relevant to the availability of relief under state law (discussed below).

The defendant styles its motion as a 12(b)(1) for lack of jurisdiction, but this aspect of their motion should be treated as a 12(b)(6) because the statute of limitations in the FTCA is no longer considered jurisdictional. *Morales-Melecio v. United States Dep't of Health & Hum. Servs.*, 890 F.3d 361, 367 (1st Cir. 2018). This is a close case and the law here is really unsettled (there's oral argument for a Supreme Court on equitable tolling this month that could actually affect this entire analysis). This could go either way.

The plaintiffs argue that the amendments relate back to the original pleading and that this is not a material change. Although neither party addresses it, there is a threshold problem with this theory. Under the regulatory scheme, claims can only be added prior to a final agency action or prior to instituting suit. 28 C.F.R. § 14.2(c). The plaintiffs added the parents' claims in July of 2021, eight months after they filed their initial complaint. The claims could be barred on those grounds alone. However, I continue on to discuss the applicable doctrine.

The question is the extent to which Rule 15(c) and the "relating back" doctrine applies to FTCA claims. *See* Rule 15(c)(1)(A) (relating back is only allowed if the substantive law allows it). Because the First Circuit has not ruled on this, I briefly review the circuit split.

The Eighth and Tenth Circuits have held that Rule 15(c) does not apply to FTCA claims because the administrative exhaustion requirement exists to incentivize settlement. Prior to filing complaints in court, parties must file administrative complaints and the United States may attempt to settle the dispute. If new parties or new claims can be added after the statute of limitations runs, that disrupts the settlement process. *Lee v. United States*, 980 F.2d 1337, 1341 (10th Cir. 1992); *Manko v. United States*, 830 F.2d 831, 840-42 (8th Cir. 1987). Thus, "material changes" are barred, a test followed by at least one District Court in this circuit. *McKenzie v. United States*, No. 1:21-CV-00233-NT, 2022 WL 2073373, at *4 (D. Me. Jun. 9, 2022)

The Ninth Circuit has ruled that Rule 15(c) applies without limitation to FTCA claims (it simply applies Rule 15). In a similar case, they allowed a parent suing on behalf of his son to amend his complaint to include his own damages on the theory that the primary concern under 15(c) is notice and the nature of the claim gave the United States adequate notice the parent might also have claims. *Avila v. INS*, 731 F.2d 616, 620 (9th Cir. 1984). However, that case is distinguishable because the plaintiff included both damages for himself and his son in the initial complaint, but essentially misfiled it (he signed the complaint but listed the complainant as his son, then later refiled in compliance with the regulations). Here, the parents just filed the individual claims late.

The First Circuit has not ruled on this definitively, but there are rulings in the periphery. The First Circuit has held that compliance with the requirement of timely claims and including a sum certain in the administrative claim is important because it allows for good faith and accurate settlement negotiations. *Holloway v. United States*, 845 F.3d 487, 489–90 (1st Cir. 2017); *Coska v. United States*, 114 F.3d 319, 323 (1st Cir. 1997). This comports with the reasoning in *Manko* and *Lee*. But the First Circuit has also, in a different context, held that other portions of Rule 15(c) apply to FTCA claims. *Roman v. Townsend*, 224 F.3d 24, 28 (1st Cir. 2000).

If you follow the "material change" test, plaintiffs' claims are barred. As the Court in *McKenzie* noted, adding new parties disrupts the settlement process, especially when those claims are filed after the final agency action. 2022 WL 2073373, at *4. Plaintiffs argue this is a "hyper technical" reading that betrays the spirit of the FTCA. But each named parent is requesting an additional $650,000 in damages. Even in *Avila*, the father (whose son was wrongly deported) was requesting only the cost of searching for his son, amounting to $2,985, and that cost was included in the initial complaint. 731 F.2d at 618. However, if Rule 15(c) applies, I think it is pretty clear the "transaction or occurrence" standard is met.

If their claim is barred, the plaintiffs argue they are entitled to equitable tolling. It's not clear whether the test in the First Circuit is the five-factor test announced in *Jobe v. I.N.S.*, 238 F.3d 96, 100 (1st Cir. 2001), or the two-part test announced in *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005), which the First Circuit has taken to citing in lieu of *Jobe*, *see, e.g.*, *Tay-Chan v. Barr*, 918 F.3d 209, 213 (1st Cir. 2019).

Either way, the plaintiffs lose on diligence. The parents brought claims on behalf of their children in a timely manner and therefore cannot argue there was anything preventing them from bringing claims on their own behalf. The plaintiffs argue that they had legitimate reason to fear persecution by both Guatemalan and American authorities. That might well be true, but it does not explain how bringing claims on their own behalf materially increases their risk of prosecution when they have already brought claims on behalf of their children. Similarly, they argue they suffer from trauma. Again, while mental illness can justify equitable tolling, *Bartlett v. Dep't of the Treasury (I.R.S.)*, 749 F.3d 1, 12 (1st Cir. 2014), and the court should not rely on facts outside the pleading, *Duke v. Cmty. Health Connections, Inc.*, 355 F. Supp. 3d 49, 57-58 (D. Mass. 2019), the plaintiffs cannot explain why any mental illness prevented them from bringing claims on behalf of themselves when they brought claims on behalf of their children. Again, there is no substantive difference between those claims.

The equitable tolling argument should be denied if it is reached.

III. FTCA Exceptions

The bulk of the arguments concern FTCA exceptions. The parties discuss the discretionary function exception ("DFE") before the due care exception ("DCE"). I am going out of order because the analysis of the DCE informs the analysis of the DFE.

Because this is an issue of sovereign immunity, defendant brings a 12(b)(1) motion. The burden is on the party asserting jurisdiction—here, the plaintiffs. *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir. 1995). Because the defendant does not contest the facts, the standard of review is functionally identical to a 12(b)(6) motion in that the court considers whether jurisdiction is "plausible" on the facts alleged. *Cebollero-Bertran v. Puerto Rico Aqueduct & Sewer Auth.*, 4 F.4th 63, 69 (1st Cir. 2021).

A. Due Care Exception

This exception comes from 28 U.S.C. § 2680(a), which reads, "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." There is only a single First Circuit case on the DCE from the late 1980s and virtually no district of Massachusetts or even other First Circuit district precedent on this doctrine. I review that case as well as the leading cases from other circuits.

The DCE only applies to regulations and statutes, not policies. *Hydrogen Tech. Corp. v. United States*, 831 F.2d 1155, 1160 n. 65 (1st Cir. 1987).[3] What seems to be the leading case clarifies that the statute must "specifically [prescribe][4] a course of action for an officer to follow." *Welch v. United States*, 409 F.3d 646, 652 (4th Cir. 2005). This is not inconsistent with *Hydrogen Technology* and makes sense insofar as it prevents the government from pointing to a general statute to avoid liability under the FTCA, so I recommend following it.

If there is a statute or regulation, courts must determine if the officer was negligent in enforcing the law, applying federal common law standards of negligence, not state law. *Hydrogen Technology*, 831 F.2d 1160-62. This seems to consist of looking to the Restatement (Second) of Torts and conducting a reasonableness inquiry. *Id.* at 1161. One aspect of the inquiry is whether there was an obviously better alternative to the course of action taken. *Id.* at 1163.

The defendant relies on the TVPRA, 8 U.S.C. § 1232(b)(3), which requires UACs to be transferred to the custody of the Secretary of HHS with 72 hours (here, ORR). The defendant argues: (1) having made the decision to refer the parents for criminal prosecution, (2) the parents needed to be put in secure immigration detention facilities separate from their children, (3) at which point the children became unaccompanied, and (4) § 1232(b)(3) became binding. Thus, it was faithfully implementing a statute and cannot be held liable.

The problem with defendant's syllogism is (2): the children were *already separated* before § 1232(b)(3) became relevant. The separation that caused the harm was due either to the "zero tolerance policy" or the policy of separating families. The TVPRA might have mandated a transfer to ORR after that initial separation, but the government cannot hide behind the DCE when it triggers a statutory scheme with conduct not mandated by the statute.

Furthermore, the plaintiffs have plausibly alleged § 1232(b)(3) was negligently implemented. Contrary to the defendant, this does not require the statute be violated (though that would be relevant), it is just a reasonableness inquiry. In implementing the transfer to ORR, a reasonable officer would not take active steps to prevent families from speaking to each other. The obvious better alternative would have been to prioritize contact to minimize the traumatic experience and ensure reunification when appropriate—especially considering this was not a criminal detention.

C. Discretionary Function Exception

[3] The defendant does not argue, as it did in other cases, that the DCE applies to executive policies; those policies cannot shield it because they are not statutes or regulations.

[4] The actual text says "proscribe," which makes no sense; presumably, the court meant "prescribe."

First, the plaintiffs put forward a straightforward DFE analysis. Second, they argue that because the conduct is unconstitutional, the DFE does not apply.

In either case, the first step is to identify the conduct that caused the harm. *Fothergill v. United States*, 566 F.3d 248, 253 (1st Cir. 2009). Other than the assault and battery claims, discussed separately, the harms flow from separating the families (including the continuing separation) and the lack of information or communication afforded to them during the separation. The claims do not concern the other conditions of confinement.

The second step is to determine if the conduct was discretionary. In general, the analysis should be slanted in favor of immunity. *Reyes-Colon v. United States*, 974 F.3d 56, 60 (1st Cir. 2020).

i. Straightforward DFE

a. The First Prong – Is there a statute, regulation, or policy on point?

The first prong of the second step concerns the policy itself. In practice, plaintiffs must point to a statute, regulation or policy that prescribes or proscribes a certain course of action. *Reyes-Colon*, 974 F.3d at 58. If a statute either mandates or forbids some activity, and the officers engaged (or did not) in that activity, the DFE does not apply.

Here, the defendant argues that the decision to separate families was a casebook example of prosecutorial discretion: whether and how to prosecute individuals for immigration crimes. *KW Thompson Tool v. United States*, 836 F.2d 721, 729 (1st Circ. 1988). In response, the plaintiffs argue that the conduct violated the *Flores* settlement, violated the TVPRA by unlawfully classified the children as unaccompanied alien children ("UACs"), violated CBP policies that emphasize maintaining family unity, and were done pursuant to executive policy that left no discretion for line officers. If the plaintiffs can make any of those arguments successfully, the defendant's references to prosecutorial discretion cannot save it because the government has no discretion to make prosecutorial decision that violate binding authorities.

1. *Flores* Settlement and the Handbook

First, the plaintiffs argue that the defendant's conduct violated the *Flores* settlement's requirement that noncitizen children are kept in safe conditions. That is non-starter: the conduct challenged is *not* the unsafe conditions, but the separation.

Second, the plaintiffs argue that the *Flores* settlement does not allow the separation of families. But the cases they cite hold that the *Flores* settlement does not *mandate* the separation of families, not that *Flores* forbids it. The principal case they cite holds that "detained parents may choose to exercise their [constitutional] right to reunification or to stand on their children's *Flores* Agreement rights. Defendants may not make this choice for them." *Flores v. Sessions*, No. 854544-cv-DMG, 2018 WL 4945000, at *4 (C.D. Cal. July 9, 2018). In that case, a previous injunction issued on constitutional grounds gave parents a right to reunification. The *Flores* settelment gave children a right to be released from detention within a certain time and to be detained under certain conditions. The government argued that the injunction conflicted with the